CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 53

GANGE LUMBER COMPANY, APPELLANT,

vs.

RALPH ROWLEY AND DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED MARCH 30, 1945

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 53

GANGE LUMBER COMPANY, APPELLANT,

vs.

RALPH ROWLEY AND DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX

	Original	Print
Proceedings before Department of Labor and Industries of State of Washington	1	1
Report of accident and claim for compensation	1	1
Order of Supervisor of Industrial Insurance, Jan. 19, 1938	2	3
Order of Supervisor of Industrial Insurance, March 1, 1938	3	4
Application to reopen claim	4	5
Order of Supervisor of Industrial Insurance denying application to reopen claim	5	7
Application to Joint Board for rehearing	6	8
Order of Joint Board denying application for rehearing	7	9
Record from Superior Court of Pierce County	8	10
Notice of appeal from order of Joint Board	8	10
Motion to dismiss appeal	9	11
Order granting motion to dismiss, etc.	11	13
Notice of appeal to Supreme Court of Washington	13	14
Proceedings in Supreme Court of Washington—First Appeal	15	15
Excerpts from appellee's brief	15	15
Excerpts from appellee's petition for rehearing	19	18
Order denying petition for rehearing	22	19
Judgment	23	20

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 10, 1945

—9156

	Original	Print
Judgment of Superior Court on remittitur of Supreme Court	25	21
Further proceedings before Department of Labor and Industries of State of Washington	27	23
Order of Joint Board remanding to Supervisor of Industrial Insurance	27	23
Report of medical examination, Oct. 28, 1944	28	24
Order reopening claim	30	27
Employer's application for rehearing	31	28
Order of Joint Board denying application for rehearing	36	32
Record from Superior Court of Pierce County	37	33
Notice of appeal from order of Joint Board	37	33
Plaintiff's motion for judgment on the record	39	34
Defendants' motions for judgment of dismissal	45	35
Order granting motions for dismissal, etc.	48	38
Notice of appeal to Supreme Court	51	40
Proceedings in Supreme Court of Washington—Second Appeal	52	41
Excerpts from appellant's brief	52	41
Excerpts from appellant's petition for rehearing	54	43
Order denying petition for rehearing	55	43
Judgment	56	44
Opinion, Grady, J. (First Appeal)	82	45
Dissenting opinion, Millard, J. (First Appeal)	92	53
Opinion, Jeffers, J. (Second Appeal)	113	72
Concurring opinion, Millard, J. (Second Appeal)	119	78
Petition for appeal and writ of supersedeas	119-A	78
Assignments of error	119-F	82
Bond on appeal (omitted in printing)	120	
Order allowing appeal and writ of supersedeas	125	84
Citation and service (omitted in printing)	127	
Stipulation for transcript of record	129	86
Clerk's certificate (omitted in printing)	132	
Statement of points to be relied upon and designation of parts of record to be printed	133	88
Order noting probable jurisdiction	134	89

EMPLOYER MUST COMPLETE THIS REPORT BY FILLING IN AND SIGNING EMPLOYER'S SECTION BELOW. THEN MAIL REPORT AT ONCE DEPARTMENT OF LABOR AND INDUSTRIES, DISTRICT OFFICE.

S. F. No. 133. -42—150M. 2696. (SEE REVERSE SIDE FOR ADDRESS)

(TO BE USED BY DEPARTMENT ONLY)
Adjudged non-compensable except for Medical Aid bills allowable by law.

JAY OLINGER (STAMPED)
Supervisor of Industrial Insurance

By
Asst. Claim Agent

MEDICAL AID AWARDS	Amount	Computed	Date Notice Sent	Warrant No.

Claim No.
Firm No.
Ind. Ins. Cl.
Med. Aid Cl.
Cont. Non-Cont.

State of Washington
Department of Labor and Industries

REPORT OF ACCIDENT

Social Security No.

Firm or Employer's Name Gange Lumber Company

Address

NAME OF INJURED WORKMAN Ralph Rowley

ADDRESS 4821 Pacific Ave.

How long have you worked for this employer? 2 yrs. Wage per day 6.65

Place of birth Colorado Age 36 Height 5' 8" Weight 156

DATE ACCIDENT OCCURRED July 13, 1937 State hour of accident 3:30 p.m. A.M. P.M.

Give last date worked July 13, 1937 If you have returned to work give date

DESCRIBE THE ACCIDENT IN FULL: A Turned on switch on resaws while he was changing saws man caught rt. index, mid and rings fingers in saw.

State nature and dates of any previous injuries received by you no

Name of health or accident insurance companies or fraternal organizations with whom insured no monthly benefits

Were safeguards provided? yes Was machine or appliance in good repair? yes

Name of person under whose direction you were working

Give name of attending physician DR. THOMAS B. CURRAN

Give full name and address of your wife or husband (if married) Frances Rowley 4821 Pacific Ave.

Date and place of marriage Have you a marriage certificate?

Are you living together as husband and wife? Has a divorce complaint been filed? If so, has either an interlocutory or final decree been entered? Date of decree

(Specify which)

Name Your Children Under 18 Supported by You	Date of Birth Mo.	Day	Year	Name Your Children Under 18 Supported by You	Date of Birth Mo.	Day	Year
Barbara			1930				
Richard			1937				

Signed this 30th day of July, 1937 at Tacoma, Washington.

WORKMAN MAKING CLAIM SIGN FULL NAME HERE RALPH ROWLEY (S)
(Sign in ink)

If unable to write make your mark in presence of a witness. Signature of witness to mark
(Sign in ink)

All Questions Must Be Answered
WORKMAN'S REPORT

5

All

Interlocutory or final decree been entered ..... Date of decree .....
(Specify which)

Name Your Children Under 18 Supported by You	Date of Birth Mo.	Day	Year	Name Your Children Under 18 Supported by You	Date of Birth Mo.	Day	Year
Barbara			1930				
Richard			1937				

Signed this 30th day of July, 19 37 at Tacoma, Washington.

WORKMAN MAKING CLAIM SIGN FULL NAME HERE ☞ RALPH ROWLEY (S)
(Sign in ink)

If unable to write make your mark in presence of a witness. Signature of witness to mark .....
(Sign in ink)

All Questions Must Be Answered
EMPLOYER'S REPORT

EMPLOYER MUST COMPLETE THIS REPORT BY FILLING IN AND SIGNING EMPLOYER'S SECTION BELOW. THEN MAIL REPORT AT ONCE TO DEPARTMENT OF LABOR AND INDUSTRIES, DISTRICT OFFICE.
(SEE REVERSE SIDE FOR ADDRESS)

FIRM NUMBER OF EMPLOYER .....

FIRM NAME OF EMPLOYER Gange Lbr Address Chas. M. Clark, 320 Perkins Bldg.

Location of plant or place of work where accident occurred 3939 Rusten Way

Business of employer Sawmill (If engaged in construction work state particular kind) Give Industrial Insurance Class for this claim EH

Check in which department workman was employed: Construction ☐ Operation ☒ Repair ☐ On launched boat ☐

NAME OF INJURED WORKMAN R. ROWLEY

Social Security No. .....

Has he any financial interest in the business? .....

Date and hour of accident 7/13/37 ~~A.M.~~ P.M. Last day worked 7/13/37 Date returned to work ---

Was workman engaged in the regular course of his employment when injured? yes Occupation of workman resawyer

Did accident occur on your premises? yes If injured away from plant of employer give full particulars relating to the cause of the accident .....

Date and hour accident reported to you 7/13/37 ~~A.M.~~ P.M. To whom reported M. E. Gange Position foreman

Have you reason to oppose allowance of this claim? .....

Will this workman be kept on salary during his period of disability? .....

Have the hours worked and wages paid this workman been included in the monthly payrolls reported to this department? .....

Report how accident occurred:

A switch was thrown in to start resaw, Rowley grabbed at saw

Signed this 4th day of Aug. 19 37

Gange Lbr.
EMPLOYER

By M. E. Gange (S) Foreman
OFFICIAL POSITION
(Use ink)

Must Be Answered
N'S REPORT

Employer's name GANGE LUMBER COMPANY Address TACOMA, WASHINGTON

Workman's name RALPH ROWLEY Address 4821 Pacific Ave.

Date of accident July 13, 1937 DATE OF FIRST TREATMENT July 13, 1937

Describe in full the parts injured and mark upon the chart on the back of this report the site of injury, if arm or hand or leg state whether right or left rt. index, mid and ring fingers

DESCRIBE EXTERNAL EVIDENCE OF INJURY Chip fracture mid phalanx of both index and mid
Severance of flexor sublimis digitorum) fingers. of index and mid fingers. And
" " flexor profundus digitorum) extensive longitudi laceration over palmer side of all phalanxes of ring fingers.

Do you believe present condition or disability is result of above injury? .....

X-RAY FINDINGS (Strike one) Negative / Positive } Give treatment used Sutured tendons. Dermal to skin, all under local anesthesia.
Small Chips separated from shaft of middle phalanx of 1st and 2nd fingers.

Has he been previously treated for this injury? —

ur accident ? 11/13/37

Have you reason to oppose allowance of this claim?

Will this workman be kept on salary during his period of disability?

Have the hours worked and wages paid this workman been included in the monthly payrolls reported to this department?

Report how accident occurred:

A switch was thrown in to start resaw, Rowley grabbed at saw

Signed this 4th day of Aug. 1937

Gange Lbr.
EMPLOYER

By M. E. Gange (S) Foreman
OFFICIAL POSITION (Use ink)

All Questions Must Be Answered
PHYSICIAN'S REPORT

Employer's name GANGE LUMBER COMPANY Address TACOMA, WASHINGTON

Workman's name RALPH ROWLEY Address 4821 Pacific Ave.

Date of accident July 13, 1937 DATE OF FIRST TREATMENT July 13, 1937

Describe in full the parts injured and mark upon the chart on the back of this report the site of injury, if arm or hand or leg state whether right or left rt. index, mid and ring fingers

DESCRIBE EXTERNAL EVIDENCE OF INJURY Chip fracture mid phalanx of both index and mid
Severance of flexor sublimis digitorum) fingers. of index and mid fingers. And
" " flexor profundus digitorum) extensive longitudi laceration over palmer side of all phalanxes of ring fingers.

Do you believe present condition or disability is result of above injury?

X-RAY FINDINGS (Strike one) Negative / Positive } Give treatment used Sutured tendons. Dermal to skin, all under local anesthesia.
Small Chips separated from shaft of middle phalanx of 1st and 2nd fingers.

Has he been previously treated for this injury?

Is there any evidence of venereal disease? Tuberculosis?

Name and address of hospital to which patient was taken Not hospitalized.

ESTIMATE DURATION OF TIME LOSS FROM WORK 4-6 wks DATE PATIENT RESUMED WORK

Describe any previous injury received by patient no

This report can be accepted only when signed by a licensed physician.

Signed THOS. B. CURRAN (S)
DR. THOS B. CURRAN
(Sign in ink) Attending Physician

Address Perkins Building
Tacoma, Wash.

Date July 31, 1937 Rec'd Aug. 6, 1937

Memo by Chief Medical Adviser:

1

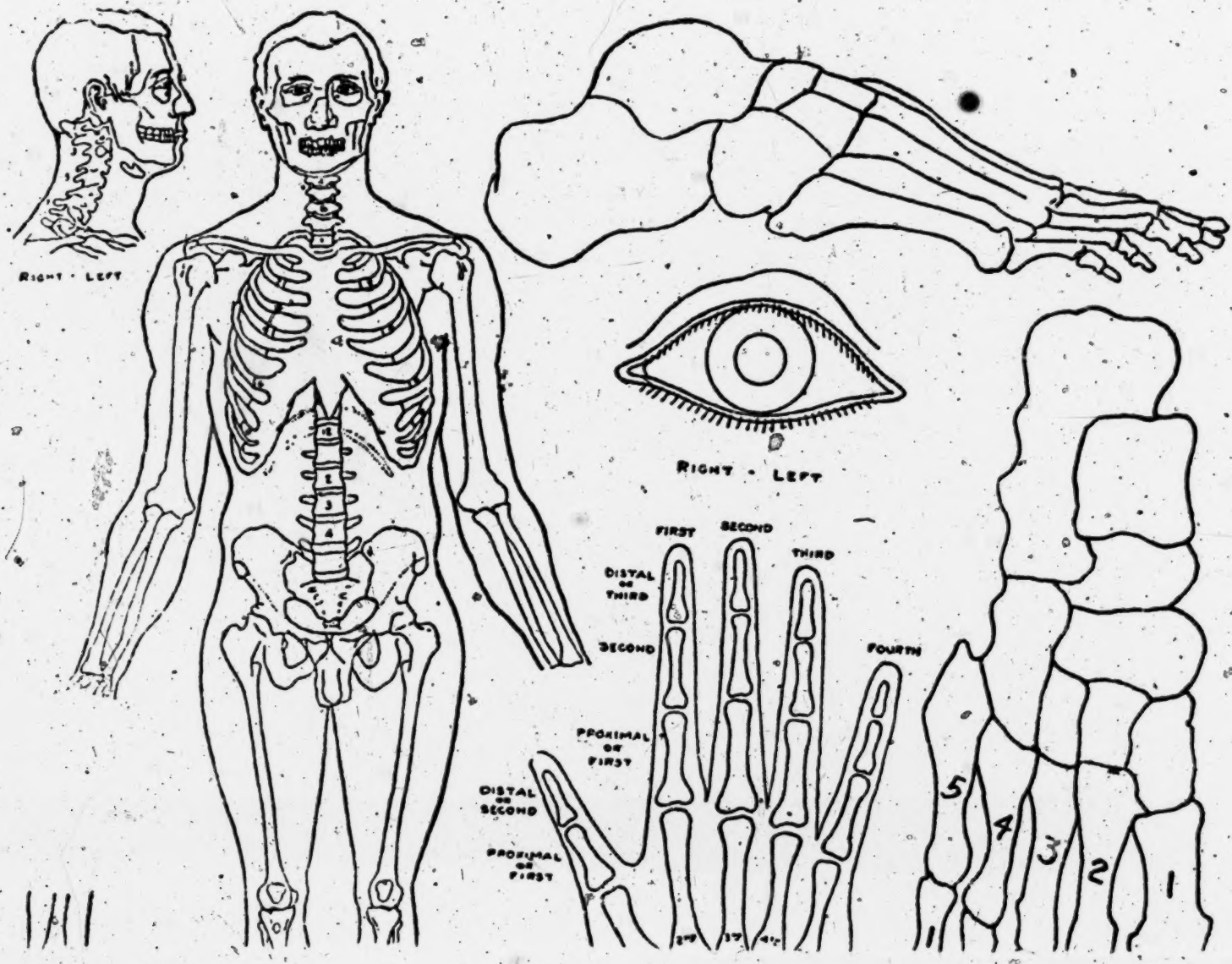
(Over)

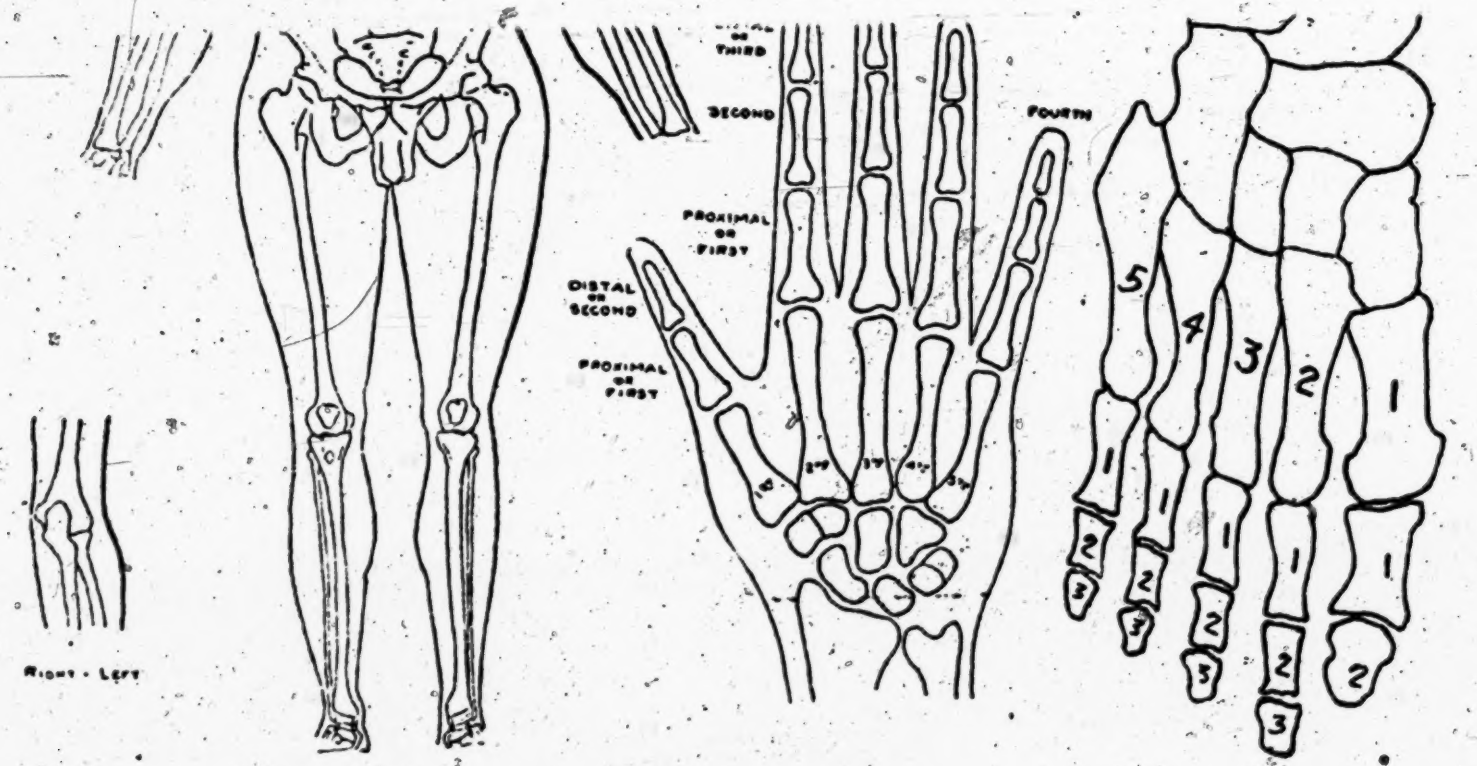
INSTRUCTIONS TO ATTENDING PHYSICIAN

IF THIS REPORT HAS BEEN FILLED OUT BY THE EMPLOYER SEND THIS REPORT TO DEPARTMENT OF LABOR AND INDUSTRIES, DISTRICT OFFICE. IF THE EMPLOYER HAS NOT MADE OUT REPORT SEND THIS TO HIM FOR THAT PURPOSE.

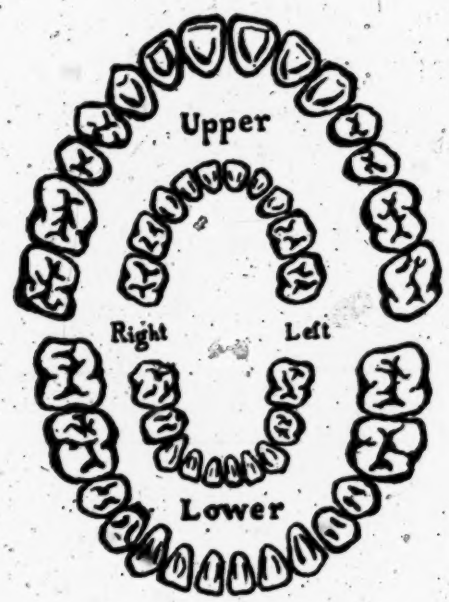
DISTRICT OFFICES

1318 Smith Tower Seattle	421 Perkins Bldg. Tacoma	30 Aldwell Bldg. Pt. Angeles	Finch Bldg. Aberdeen	Bremer Bldg. Bremerton
325 Herald Bldg. Bellingham	First National Bk. Bldg. Mt. Vernon	1-2 Blurock Bldg. Vancouver	P. O. Box 1003 Longview	717 Baker Bldg. Walla Walla
205 Commerce Bldg. Everett	501 Hutton Bldg. Spokane	220 Liberty Bldg. Yakima	Fuller-Quigg Bldg. Wenatchee	




RIGHT - LEFT
THIRD
SECOND
FOURTH
PROXIMAL OR FIRST
DISTAL OR SECOND
PROXIMAL OR FIRST
5
4
3
2
1

RIGHT-LEFT


Upper
Right
Left
Lower

[fol. 2] IN AND BEFORE THE SUPERVISOR OF INDUSTRIAL INSURANCE, DEPARTMENT OF LABOR AND INDUSTRIES, STATE OF WASHINGTON

FINAL SETTLEMENT

ORDER AND NOTICE

Copy

Firm Name: Gange Lbr. Co., % Chas. M. Clark, 320 Perkins Bldg., Tacoma, Wn.

Mailed 1-25-38, Department of Labor & Industries, Olympia.

Claimant: Ralph Rowley, 4821 Pacific Ave., Tacoma, Wn.

Claim No.	Firm No.	Class	Date Injured
813023	56397	10-2	7-13-37

On this date, the complete record of the above claim being presented to the Supervisor of Industrial Insurance, and he having carefully and thoroughly considered all matters contained therein, and you being hereby notified, now:

It is hereby ordered that this claim be closed with payments as follows:

Lump Sum Settlement of Claim:

Time loss, temporary total disability to As Paid No. days $——.

Permanent partial disability 5.76 $172.80.

Medical services will not be provided, nor bills therefore paid after —— ——, except if authorized and rendered prior to mailing date of this notice.

Warrant No. 928151. Mailed —— ——.

Notice sent employer: 1-19-38. Total $——.

Other payments made at this time:

Warrant Mailed —— ——.

Adjusted on PDN on Goering.

Dated: 1-19-38 jw.

At Olympia, Washington

Tacoma

Attending Physician —— ——.

Branch Office, Jay Olinger (Stamped) Supervisor of Industrial Insurance, by Underwood (s), Ass't. Claim Agent.

(These findings and decision hereon are official and effective when and only when signed by the personal or facsimile signature of the Supervisor of Industrial Insurance and the personal signature of the claim agent or other person duly authorized.)

[On margin] On the date stamped hereon, the original of which this is a copy, was deposited in the United States mail with postage prepaid and addressed to the claimant and/or other interested parties to their respective addresses as indicated hereon, by the person whose initials appear on said stamp. Warrant in payment of same will go forward to claimant in approximately 7 days from this date.

[fol. 3] IN AND BEFORE THE SUPERVISOR OF INDUSTRIAL INSURANCE, DEPARTMENT OF LABOR AND INDUSTRIES, STATE OF WASHINGTON

FINAL SETTLEMENT

ORDER AND NOTICE

Copy

Mailed 3-9-38, Department of Labor & Industries, Olympia, P (s).

Firm Name: Gange Lbr. Co., % Chas. M. Clark, 320 Perkins Bldg., Tacoma, Wn.

Claimant: Ralph Rowley, 4821 Pacific Ave., Tacoma, Wn.

Claim No.	Firm No.	Class	Date Injured
813028	55397	10-2	7-13-37

On this date, the complete record of the above claim being presented to the Supervisor of Industrial Insurance, and he having carefully and thoroughly considered all matters contained therein, and you being hereby notified, now:

It is hereby ordered that this claim be closed with payments as follows:

Lump Sum Settlement of Claim:

Time loss, temporary total disability to As Paid No. days $ ——.

Permanent partial disability Add'l Degrees 4.49, $134.70.

Medical services will not be provided, nor bills therefor paid after —— ——, except if authorized and rendered prior to mailing date of this notice.

Warrant No. 933281. Mailed —— ——.

Notice sent employer: 3-1-38. Total $—.

Other payments made at this time: Tvl. Ex. $1.55.

Warrant Mailed —— ——.

Adjusted on PH on Highmiller.

Dated: 3-1-38 jw.

At Olympia, Washington.

Attending Physician: —— ——.

Branch Office. Jay Olinger (Stamped) Supervisor of Industrial Insurance, by F. Gill (s), Ass't. Claim Agent.

(These findings and decision hereon are official and effective when and only when signed by the personal or facsimile signature of the Supervisor of Industrial Insurance and the personal signature of the claim agent or other person duly authorized.)

[On margin] On the date stamped hereon, the original of which this is a copy, was deposited in the United States mail with postage prepaid and addressed to the claimant and/or other interested parties to their respective addresses as indicated hereon, by the person whose initials appear on said stamp. Warrant in payment of same will go forward to claimant in approximately 7 days from this date.

——

[fol. 4] STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES, OLYMPIA

APPLICATION TO REOPEN CLAIM No. 813023

I hereby make application to reopen my claim and in support thereof furnish the following information:

Name of injured workman: Ralph Rowley.

Present address: 4006 N. 35th Tacoma.

Name of firm or employer at time of injury: Gange Lbr. Co.

Address: Tacoma.

Date of injury: July 13, 1936.

Date claim was closed: Summer or fall 1936.

For what purpose is the reopening requested: Condition is worse.

In what manner has your condition become worse since your claim was closed? Fingers are numb and stiff; tire easily and ache; are sore; can't close index finger; others are partially stiff; grip is weake

Have you had any other injuries since the above? No.

What work have you done and for whom, since your case was closed? State fully: Same as before.

What treatment have you had, and by what physicians, since claim was closed? No.

Are you working at present? Yes.

If not, give last date worked: —— ——.

If married, are you living with your wife and family? Yes.

If not, furnish proof of support of wife and children: ——.

If any children under sixteen years of age, give names and birthdates: Barbara, 13 yrs. old; Richard, 6 yrs. old.

Remarks: —— ——.

Date: March 13, 1943.

Sign here: Ralph Rowley (s).

STATEMENT BY EMPLOYER AT TIME OF INJURY

Has workman been employed since the date of accident? If not, state why: —— ——.

Give date: —— ——.

What kind of work? —— ——.

What wages? —— ——.

Has he been employed elsewhere to your knowledge? ——.

Has workman had other accidents or injuries? —— ——.

Has claimant been able to do full time work? —— ——.

If not, state fully: —— ——.

Do you recommend reopening of claim? —— ——.

For what purpose? —— ——.

3 yr. statutes has operated send O. & M. JHF (s) 3/24/43.

Date —— ——.

Employer: —— ——.

A report from your previous attending physician will facilitate action on your case and if you are still living in the same community that he does, please have the following section of this form filled in by him. If he is not available, notify the department.

STATEMENT BY ATTENDING PHYSICIAN

Have you examined claimant since claim was closed? —— ——. When? —— ——.

What is the claimant's condition, resulting from the injury, as compared with examination at the time you previously discharged him? —— ——.

Is the present condition due to the injury for which this claim was filed?

Do you recommend a reopening of the claim? —— ——.

For treatment? —— ——.

For time loss? —— ——. Or both? —— ——.

What treatment has been given by you since the claim was closed? —— ——.

Date: —— ——.

Rec'd Mar. 19, 1943.

—— ——, Attending Physician.

[fol. 5] IN AND BEFORE THE SUPERVISOR OF INDUSTRIAL INSURANCE, DEPARTMENT OF LABOR AND INDUSTRIES, STATE OF WASHINGTON

ORDER AND NOTICE

Gange Lumber So., % Chas. M. Clark, 320 Perkins Bldg., Tacoma, Washington.

Claimant: Ralph Rowley, % E. E. Stark, P. O. Box 985, Olympia, Washington.

Claim No.	Firm No.	Class	Date Injured
813023	55397	10-2	July 13, 1937

On this date, the complete record of the above claim being presented to the Supervisor of Industrial Insurance, and he having carefully and thoroughly considered all matters contained therein, and you being hereby notified, now:

It Is Hereby Ordered That

Following receipt of your application of March 13, a review of your claim file indicates that your claim was closed on March 1, 1938.

Section 7679-H of the Industrial Insurance Act provides in effect that should any claimant sustain an aggravation of

his disability any time within three years of the closing of his claim he may apply for further consideration.

You will note from the above that the Statute of Limitations has operated against your claim and the Department is without authority to take further action. Your claim will therefore remain closed in accordance with our final order of March 1, 1938.

Dated March 24, 1943-aa. At Olympia, Washington.

Mailed Mar. 24, 1943. Department of Labor & Industries, Olympia by AA (s).

Branch Office, John Shaughnesy, Supervisor of Industrial Insurance, by J. H. Fuller (s), Ass't. Claim Agent.

(These findings and decision hereon are official and effective when and only when signed by the personal or facsimile signature of the Supervisor of Industrial Insurance and the personal signature of the claim agent or other person duly authorized.)

[On margin] On the date stamped hereon, the original, of which this is a copy, was deposited in the United States mail with postage prepaid and addressed to the claimant and/or other interested parties to their respective addresses as indicated hereon, by the person whose initials appear on said stamp.

[fol. 6] APPLICATION FOR REHEARING

3-29-43. LMR (s)

March 26, 1943.

Joint Board Dept. Labor & Industries, Olympia, Washington

Re: Claim 813023. Ralph Rowley

GENTLEMEN:

I hereby appeal to the Joint Board for review and reversal of the Supervisor's order of March 24, 1943 in the above claim.

The Supervisor's order of March 24th states in part that "Section 7679-H of the Industrial Insurance Act provides—

that—aggravation—within three years of the closing of his claim (claimant) may apply for further consideration. (This) Statute of Limitations has operated against your claim."

My application for reopening of this claim was filed March 13, 1943, and the Supervisor's order was entered March 24, 1943. It is my belief and understanding that during this time the Section 7679-H of the Industrial Insurance Act provided that I might have five years from the effective date of that act to apply for reopening; that I am entitled to reopening of these claims. The fingers of my injured hand have become numb and stiff; the hand tires easily and aches; the fingers are sore; I cannot close my index finger; the others are partially stiff; the grip of my hand is weaker; the condition has become worse and aggravated since the claim was closed.

Therefore I respectfully request that the Supervisor's action be reversed and the claim be reopened for further treatment if indicated and for increased compensation.

Kindly address all mail % E. E. Stark, P. O. Box 985, Olympia, Washington.

(S.) Ralph Rowley.

E. E. Stark, Charles R. Carey.

Rec'd. March 29, 1943.

[fol. 7] IN AND BEFORE THE DEPARTMENT OF LABOR AND INDUSTRIES, STATE OF WASHINGTON

JOINT BOARD

Dated April 5, 1943.
At Olympia, Washington

ORDER AND NOTICE

Mr. Ralph Rowley, % E. E. Stark, P. O. Box 985, Olympia, Washington

Claimant: Ralph Rowley.

Claim No.	Firm No.	Class	Date Injured
813023	55397	10-2	7-13-37

On this date, the complete record of the above claim being presented to the Joint Board in Executive Session and the

Joint Board having carefully and thoroughly considered such record together with all evidence offered in the matter, and you being hereby notified, now:

It Is Hereby Ordered That

The application for rehearing be and hereby is denied; the Joint Board in its opinion considers that the Department has previously considered fully all matters raised by said application, and the Supervisor's order of March 24, 1943, is hereby confirmed.

cc to Mr. E. E. Stark.

cc to Gange Lumber Company, % Chas. M. Clark, 320 Perkins Building, Tacoma, Washington.

Joint Board, Mailed Apr. 7, 1943. RK (s).

Joint Board, Robert H. Harlin, Director; John Shaughnessey, Supervisor of Industrial Insurance; Jno. E. Morgan, Supervisor of Safety; (S.) L. M. Rickerd, Secretary.

LMR: md.

[fol. 8] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

No. 89046

RALPH ROWLEY, Applicant and Plaintiff

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant

NOTICE OF APPEAL FROM ORDER OF JOINT BOARD OF THE DEPARTMENT OF LABOR AND INDUSTRIES DATED APRIL 5th, 1943 —Filed April 20, 1943.

To the Honorable Superior Court Judges of the Above-Entitled Court, and to the Honorable Robert *G.* Harlan, Director of the Department of Labor and Industries of the State of Washington:

You, And Each Of You, will please take notice that the applicant and plaintiff by virtue of Remington Revised Statutes of the State of Washington, feeling aggrieved by the decision and order of the Joint Board of the Depart-

ment of Labor and Industries of the State of Washington, dated April 5th, 1943, in the Matter of the Application of Ralph Rowley, Claim #813023, does hereby give notice of appeal from each and every part of said order or decision, and from all thereof, to the Superior Court of the State of Washington for Pierce County and does request a hearing denovo before the above entitled court, pursuant to the Statute laws of the State of Washington, made and provided therefor, and that the Joint Board's order be reversed.

Dated this 19th day of April, 1943.

Ralph Rowley, Plaintiff, by Allen & Carey, His Attorneys. Office and Post Office Address: 719 Second Ave. Bldg., Room 222, Seattle, King County, Washington.

Filed in Clerk's Office, Supreme Court, State of Washington, Dec. 19, 1944. Benj. T. Hart, Clerk, by Archie B. Stewart, Deputy.

[File endorsement omitted.]

[fol. 9] In Superior Court of Pierce County

[Title omitted]

No. 89046

Employer's Motion to Dismiss Plaintiff's Appeal—Filed October 27, 1943

Comes now the above named employer and moves the Court for an order dismissing the above entitled cause and appeal on the following grounds:

1. That the order of the Joint Board of the Department of Labor and Industries dated April 5, 1943, affirming the order of the Supervisor of Industrial Insurance dated March 24, 1943, denying the plaintiff's application to reopen his claim on the ground that said application and the reopening of said claim were barred by the provisions of Remington's Revised Statutes, Section 7679 (h) being Laws of 1911, Chapter 74, Section 5 (h), as amended by Laws of 1927, Chapter 310, Section 4, is in accordance with law.

2. That under the provisions of Remington's Revised Statutes, Section 7679 (h), plaintiff's right, if any, to reopening of his claim and additional compensation, on the alleged ground that his disability became aggravated after his claim was closed on March 1, 1938, expired by lapse of time prior to March 19, 1943, the date he filed his application for reopening, and said order of the Joint Board is therefore in accordance with law.

[fol. 10] 3. That said order of the Joint Board, rejecting plaintiff's contention that he was authorized by Laws of 1941, Chapter 209, Section 1, referred by petition to the people and adopted by them as Referendum No. 22 on November 3, 1942, which became effective on December 3, 1942, to apply for a reopening of his claim for aggravation as aforesaid, is in accordance with law.

4. That if Laws of 1941, Chapter 209, Section 1, adopted by the people as aforesaid, is construed as urged by plaintiff, such law is in violation of Article I, Section 3, and Article I, Section 23, of the Constitution of the State of Washington and is void.

5. That if said Laws of 1941, Chapter 209, Section 1, adopted by the people as aforesaid, is construed as urged by plaintiff, said law is in violation of Article I, Section 10, Clause 1, of the Constitution of the United States of America and of the Fourteenth Amendment to the Constitution of the United States of America and is void.

This motion is based on the records and files herein.

Dated at Tacoma, Washington this 22nd day of October, 1943.

T. J. Hanify, 802 Tacoma Building, Tacoma, Wash.; Grosscup, Morrow & Ambler, 910 Republic Bldg., Seattle, Wash.; L. B. Donley, 417-9 Finch Bldg., Aberdeen, Washington; Hulbert, Helsell & Paul, 1112 White Bldg., Seattle, Wash.; Little, Leader, LeSourd & Palmer, 820 White Bldg., Seattle, Wash.; Laube & Laughlin, 820 White Bldg., Seattle, Wash.; Attorneys for Employer, Gange Lumber Company.

[File endorsement omitted.]

NOTE: Affidavit of Service not included.

[fol. 11] IN SUPERIOR COURT OF PIERCE COUNTY

[Title omitted]

No. 89046

ORDER GRANTING EMPLOYER'S MOTION TO DISMISS PLAINTIFF'S APPEAL AND JUDGMENT OF DISMISSAL—Filed December 10, 1943.

This matter having come on for hearing on the 21st day of October, 1943, upon the employer's motion to dismiss plaintiff's appeal in the above matter, the plaintiff appearing by Allen & Carey, his attorneys, the defendant, Department of Labor and Industries of the State of Washington, appearing by Smith Troy, Attorney General and by L. E. O'Neill, Assistant Attorney General, its attorneys, and the employer, Gange Lumber Company, appearing by T. J. Hanify, and L. B. Donley, Grosscup, Morrow & Ambler, Hulbert, Helsell & Paul, Little, Leader, LeSourt & Palmer and Laube & Laughlin, its attorneys; and the Court having heard the argument of counsel and being fully advised in the premises; Now, therefore, it is,

Ordered, Adjudged and Decreed, that the employer's said motion to dismiss plaintiff's appeal be, and the same is hereby granted; and it is further,

Ordered, Adjudged and Decreed, that the plaintiff's appeal to this court be, and the same is hereby dismissed and that the decision of the Department herein be, and the same is hereby confirmed.

The plaintiff's exception thereto is hereby allowed.

[fol. 12] Done and Ordered In Open Court this 10th day of December, 1943.

E. F. Freeman, Judge.

Presented by T. J. Hanify, of Attorneys for Employer; L. E. O'Neill, Asst. Atty. Gen.; Smith Troy and L. E. O'Neill, of Attorneys for Defendant; Allen & Carey Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 13] IN SUPERIOR COURT OF PIERCE COUNTY

No. 89046

[Title omitted]

NOTICE OF APPEAL—Filed January 8, 1944

To Department of Labor and Industries of the State of Washington, defendant, and to Smith Troy, Attorney General, and L. E. O'Neill, Assistant Attorney General, attorneys for said defendant, and to Gange Lumber Company, a corporation, the Employer, and to T. J. Hanify, L. B. Donley; Grosscup, Morrow & Ambler; Hulbert, Helsell & Paul; Little, Leader, LeSourd & Palmer; and Laube & Laughlin, its attorneys:

Comes now the plaintiff, Ralph Rowley, by and through his attorneys of record and appeals to the Supreme Court of the State of Washington from the order granting Employer's motion to dismiss plaintiff's appeal and judgment of dismissal which was signed and entered by the Court on the 10th day of December, 1943.

The plaintiff hereby appeals from each and every part and portion of said order granting Employer's motion to dismiss plaintiff's appeal and judgment of dismissal and from all thereof and hereby gives notice of such appeal.

Dated this 7th day of January, 1944.

Allen & Carey, Attorneys for Plaintiff.

Office and Post Office Address of Attorneys for Plaintiff: Allen & Carey, 719 Second Avenue Building, Rooms 216-222, Seattle 4, Washington.

[fol. 14] Copy received Jan. 8, 1944. L. E. O'Neil, Asst. Atty. Gen.

Copy rec'd Jan. 7, 1944. T. J. Hanify; L. B. Donley; Grosscup, Morrow & Ambler; Hulbert, Helsell & Paul; Little, Leader, LeSourd and Palmer; Laube & Laughlin, Attys. for Employer.

[File endorsement omitted.]

[fol. 15] IN SUPREME COURT OF WASHINGTON

No. 29288

I. C. LANE, Plaintiff and Appellant,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant and Respondent, and Defiance Lumber Company, a Corporation, Employer and Respondent

No. 29289

I. C. LANE, Plaintiff and Appellant,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant and Respondent, and Gange Lumber Company, a Corporation, Employer and Respondent

No. 29290

RALPH ROWLEY, Plaintiff and Appellant,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant and Respondent, and Gange Lumber Company, a Corporation, Employer and Respondent

No. 29291

JOHN MOORE, Plaintiff and Respondent

vs.

[fol. 16] DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant, and Northwest Door Company, Employer and Appellant

Appeals from the Superior Court for Pierce County, Honorable Ernest F. Freeman and Honorable Ernest M. Card, Judges, Presiding

BRIEF OF EMPLOYERS—Filed February 15, 1944

General Statement of the Employer's Position

The employers contend (1) that those who enacted Referendum No. 22 did not intend it should apply retroactively

so as to allow reopening of claims barred by limitation of time when the Measure became effective, and that it therefore does not so apply; but (2) if it would so apply, then it is unconstitutional.

* * * * * * *

Constitutionality of Referendum No. 22

* * * * * * *

It is well settled that a statutory right which has once expired cannot be constitutionally revived.

* * * * * * *

After the *Campbell* and *Schwager* cases were decided, the case of *William Danzer & Co. v. Gulf & S. I. R. Co., supra,* 268 U. S. 633, 45 S. Ct. 612, 69 L. ed. 1126, came to the Federal Supreme Court.

* * * * * * *

The United States Supreme Court said in a unanimous opinion (at 268 U. S. 636, 637, 69 L. ed. 1128, 1129):

> [fol. 17] "Plaintiff's right to file his claim with the commission had expired several months before the passage of the Transportation Act. But, if the period of Federal control is to be excluded the complaint was filed within time. During the period between such expiration and the passage of the Transportation Act plaintiff had no right to file a claim with the Commission, and had no cause of action. *It is settled by the decisions of this court that the lapse of time not only barred the remedy, but also destroyed the liability of defendant to plaintiff. (Authority) On the expiration of the two-year period, it was as if liability had never existed.* * * *" (Emphasis ours.)

Then in discussing the earlier controversial case of Campbell v. Holt, the court continued:

> "We need not re-examine the doctrine of Campbell v. Holt, 115 U. S. 620, 20 L. ed. 483, 6 Sup. Ct. Rep. 209, as it is plain that case does not apply. That was an action on a contract for the recovery of money. By a state statute of limitations, the right of action had been

barred. The statute was repealed before the action was commenced. It was held that the action could be maintained, and that such repeal did not deprive the debtor of his property without due process of law, in violation of the 14th Amendment. The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the Statute of Limitations *related to the remedy only*, and that the removal of the bar was not unconstitutional. The opinion distinguishes the case from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes *constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability.* Such, for example, are statutory causes of action for death by wrongful act (authority), and those arising under the Federal Employers' Liability Act (authority). This case belongs to the latter class. Section 206 (f) will not be construed retroactively *to create liability.* To give it that effect *would be to deprive defendant of its property without due process of law, in contravention of the 5th Amendment.* * * *" (Emphasis ours.)

* * * * * * *

The *right* of the plaintiffs in these cases to apply for a reopening of their claims expired completely. It was not within the constitutional power of the 1941 Legislature to revive that right, if it should be held that by Referendum [fol. 18] No. 22 they intended to do so.

* * * * * * *

While we believe that Referendum No. 22 was not intended to apply retroactively as urged by the plaintiffs, still if it should be construed to the contrary, then it is unconstitutional, for it is clear that an attempt to revive or recreate a right expired under the terms of a statute creating the right but also limiting the period for its assertion violates the due process clauses of the Federal and State Constitutions.

[File endorsement omitted.]

[fol. 19] IN SUPREME COURT OF WASHINGTON

[Titles omitted]

[fol. 20] EMPLOYERS' PETITION FOR REHEARING—Filed Sept. 27, 1944

* * * * * * * * *

II

Constitutionality of the Act

The majority opinion makes two points: (1) that it is not a violation of the due process clause of the Federal or State Constitution for the Legislature to remove the bar of limitations against the assertion of a right where the limitation statute relates only to the remedy and does not inhere in the right itself; and (2) that the limitation in this case relates only to the claimant's remedy.

* * * * * * * * *

In the instant case, the majority opinion mentions *Danzer & Co. v. Gulf & S. I. R. Co.*, 268 U. S. 633, 45 S. Ct. 612, 69 L. ed. 1126, where the United States Supreme Court held that the bar to a statutory right created by Congress could not be removed, in view of the 5th Amendment to the Constitution of the United States, since the right and the time limitation for assertion thereof were parts of the same statute and that the limitation was not a mere remedial matter but inhered in and was a part of the right itself, so that when the time expired the right failed.

* * * * * * * * *

[fol. 21] In the *Danzer* case it was held that a statutory right which had expired by lapse of time could not be recreated so that the one against whom the right had previously existed would have to respond in money. We see no substantial difference here.

* * * * * * * * *

If, however, the Court holds that the Legislature intended to revive claims already barred, then the act in that respect is unconstitutional under the rule of the *Danzer* case.

* * * * * * * * *

[File endorsement omitted.]

[fol. 22] IN SUPREME COURT OF WASHINGTON

[Titles omitted]

ORDER DENYING PETITION FOR REHEARING—Filed Oct. 4, 1944

The court having considered the petition of the employers for a rehearing herein,

It Is Ordered that the petition for rehearing be and it is hereby denied.

Dated this 4th day of October, 1944.

By the Court:

George B. Simpson, Chief Justice.

[File endorsement omitted.]

[fol. 23] IN SUPREME COURT OF WASHINGTON

No. 29288, No. 29289, No. 29290, No. 29291

Pierce County No. 89043, No. 89044, No. 89046, No. 89045

I. C. LANE, Appellant,

vs.

DEPARTMENT OF LABOR and INDUSTRIES OF THE STATE OF WASHINGTON and Defiance Lumber Company, a corporation, Employer, Respondents.

I. C. LANE, Appellant,

vs.

DEPARTMENT OF LABOR and INDUSTRIES OF THE STATE OF WASHINGTON and Gange Lumber Company, a corporation, Employer, Respondents.

RALPH ROWLEY, Appellant,

vs.

DEPARTMENT OF LABOR and INDUSTRIES OF THE STATE OF WASHINGTON and Gange Lumber Company, a corporation, Employer, Respondents.

JOHN MOORE, Respondent,

vs.

DEPARTMENT OF LABOR and INDUSTRIES OF THE STATE OF WASHINGTON, Defendant; Northwest Door Company, Employer, Appellant.

JUDGMENT—October 9, 1944

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Pierce County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 9th day of October, A. D. 1944, on motion of Allen & Carey, of counsel for appellants Lane and Rowley and respondent Moore, considered, adjudged and decreed, that the judgments of the said Superior Court be, and the same are hereby reversed in the

Lane and Rowley cases and affirmed in the Moore case; and that the said I. C. Lane, Ralph Rowley and John Moore [fol. 24] have and recover of and from the said Department of Labor and Industries, Defiance Lumber Company, Gange Lumber Company and Northwest Door Company the costs of this action taxed and allowed at One hundred nineteen and 30/100 ($119.30) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 25] IN SUPERIOR COURT OF PIERCE COUNTY

No. 89046

RALPH ROWLEY, Plaintiff,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant, and Gange Lumber Company, a corportation, The employer

JUDGMENT ON REMITTITUR OF SUPREME COURT—Filed October 19, 1944

This cause coming on regularly for hearing in open court this 19th day of October, 1944, plaintiff appearing by Allen & Carey, his attorneys, the defendant by Smith Troy, Attorney General, and L. E. O'Neill, Assistant Attorney General, its attorneys, and the Employer by T. J. Hanify, one of its attorneys, and it appearing to the Court that an appeal to the Supreme Court of Washington was duly and regularly taken by the plaintiff from the judgment entered in the above entitled cause on the 10th day of December, 1943 and that, pursuant to such appeal, a judgment was entered by the Supreme Court of the State of Washington, on October 9, 1944 reversing said judgment of this Court, dated December 10, 1943, and remanding the cause to this Court for further proceedings, and it further appearing to the Court that the remitfitur of the Supreme Court upon its said judgment has been filed in the office of the clerk of this Court, and the Court being fully advised in the premises,

It is hereby Ordered, Adjudged and Decreed that the said judgment of this Court, entered on December 10, 1943, be, and the same is hereby vacated, set aside and held for nought, and

[fol. 26] It is further Ordered, Adjudged and Decreed that the decision of the Joint Board of the Department of Labor and Industries in the above entitled cause be and the same is hereby reversed, and that the above entitled cause be and the same is hereby remanded to the defendant, the Department of Labor and Industries of the State of Washington, and that said defendant be and it is hereby ordered to consider upon its merits, after the introduction of evidence at an appropriate hearing or hearings, the application of the plaintiff to the defendant in said cause for a reopening of his claim and for additional compensation, and, after such consideration, to enter an order either granting or denying said application, and if granting the same, then also readjusting the compensation to which the plaintiff may appear to be entitled; and

It is further Ordered, Adjudged and Decreed that the plaintiff have and recover judgment against the defendant, Department of Labor and Industries, for his costs and disbursements herein taxed in the amount of $12.50 and for an attorney's fee in the sum of $250.00.

Done In Open Court this 19th day of October, 1944.

E. F. Freeman, Judge.

Presented by: Charles R. Carey of Attorneys for Plaintiff.

Approved as to form and notice of presentation waived: Smith Troy, Attorney General; L. E. O'Neill, Assistant Attorney General, Attorneys for Defendant; T. J. Hanify, of Attorneys for Employer.

[File endorsement omitted.]

[fol. 27] State of Washington

Department of Labor and Industries

Joint Board

ORDER REMANDING TO SUPERVISOR OF INDUSTRIAL INSURANCE

Ralph Rowley, Claimant

Claim No. 813023

This matter comes before the Joint Board from the Superior Court of Pierce County where Judgment on Remittitur of Supreme Court was entered October 19, 1944.

Coming on for review of the entire record and file the Board concluded that the matter should be remanded to the Supervisor of Industrial Insurance to follow in accordance with the Court order and judgment.

Joint Board, Department of Labor Industries,
(Signed) Riley R. Zumwalt, Sr., Secretary.

10-30-44 RRZ:AN

[fol. 28] State of Washington

Department of Labor and Industries—Industrial Insurance Division

REPORT OF MEDICAL EXAMINATION

Name of patient, Ralph Rowley, Age 43, Claim No. 813032. Address, 4006 North 35th, Tacoma. Employer when injured, Gange L. mber Co. State who was present at examination, Ralph Rowley and E. C. Yoder, M. D. S. F. No. 1084-1-41-20M. 20945. Date of examination, October 28, 1944.

Examiners Please Note:

Please complete your report as soon as possible as compensation and/or treatment will be held up until this report is received.

History of Injury for which this claim is filed.

Ralph Rowley, an employee of the Gange Lumber Company, was injured on July 13, 1937. He sustained lacerations of the right index, middle and ring fingers on the palmar surface. On the index finger, both tendons were reported to have been severed and an oblique laceration coming through the proximal crease of the palmar surface. The same injury was sustained by the middle finger through an oblique laceration in which both tendons were reported severed, and there was an oblique laceration of the ring finger in which the tendons were not injured. These tendons were sutured up at the Western Clinic by Dr. G. J. Vanderberg. It was also reported that a small chip of bone was involved in the middle phalanx of the index and middle fingers, so that, in both the ring and middle fingers the sublimus and profundis tendons were lacerated and a small fragment of bone was chipped from the middle phalanx palmar surface. After being sutured at the Clinic, the patient was sent to St. Joseph's Hos-

History of previous injuries or diseases.

Treatment received for present injury.

Work record since present injury.

Present complaints.

pital where he remained for about five days and he was off work for a period of about thirteen weeks. A settlement was made at that time which he finally took but he does not remember the amount. He has been working ever since this period.

His complaints now are:

Findings of examination.

1. Pain and s-iffening during the cold weather in all three fingers, especially the index and middle fingers.

2. Unable to grasp tools tightly with index and middle fingers because the index finger does not completely extend or completely flex.

3. There is considerable thickening of the skin at the site of the old scar and hardening in this area. The ring finger seems to work perfectly.

Diagnosis.

General Examination: Patient is 43 years of age; married with two children. He is 5′ 7½″ tall, weight is 156 lbs. General appearance is healthy. Examination shows his blood pressure is 130/80. Tonsils appear to be chronically inflamed. Teeth are in fairly good condition, somewhat worn off. Examination of head, chest and abdomen is negative. Examination of the rectum shows the prostate is about normal in size, otherwise negative. [fol. 29] Reflexes are normal. Wasserman report was four plus; urine examination negative except for two plus pus.

Conclusions:

Examination of the fingers of the right hand shows that the index finger action is hampered by a contracture of the scar on the palmar surface which holds it slightly bent and prevents complete extension of the finger, also prevents complete flextion. The fin-

1. Is further treatment indicated? If so, what?

ger comes down to almost a tight fist but not as far as it normally should, lacking about 10 to 15% of this motion. Also lacks about 5 to 8% from complete extension. The tendons are apparently held by scar tissue and the contracture shows up in the scar of the skin which is somewhat thickened and much harder than normal palmar skin. The middle finger has less disability, practically completely flexes and extends to about eight degrees from complete extension. The ring finger is fairly normal in action and motion. X-ray of the fingers is practically negative except a very slight change in the outline of the mid phalanx of the index finger can be noted.

2. When can patient return to work?

Conclusions: There is considerable permanent partial disability in this hand. I think treatment was adequate, the suturing apparently held but there was some contracture of the scar. This is a very difficult place for tendon suture. The time loss was apparently adequate. A PPD of 40% of the normal hand would be liberal and justified in this case, and a rough estimate is all that can be given. The difference in the amount of PPD mentioned above and the amount which has already been paid in this case is justified because of aggravation of the contracture and scarring which has been mentioned above.

3. What is the permanent partial disability expressed in terms of percentage as compared to the loss of the member at nearest point of amputation?

(S.) F. C. Yoder, M. D.,
Signature of
Examiner.

G: Pay on this JF (s) 11/25/44
Rec'd Nov. 9, 1944 Tacoma, Wash.

[fol. 30] IN AND BEFORE THE SUPERVISOR OF INDUSTRIAL INSURANCE, DEPARTMENT OF LABOR AND INDUSTRIES, STATE OF WASHINGTON

ORDER AND NOTICE TO REOPEN CLAIM

Firm Name: Gange Lumber Co., 320 Perkins Bldg., Tacoma, Wash.

Claimant: Ralph Rowley, % E. E. Stark, P. O. Box 985, Olympia, Wn.

Claim No.	Firm No.	Class	Date Injured
813023	55397	10-2	7/13/37

On this date, the complete record of the above claim being presented to the Supervisor of Industrial Insurance, and he having carefully and thoroughly considered all matters contained therein, and you being hereby notified, now:

It is hereby ordered that the above numbered claim is REOPENED effective this date for time loss as paid ——— for paying $460.50 additional ——— permanent partial disability for treatment.

The reopening was recommended by Miles Gilbert, Ass't Claim Agent On Jt. Bd.

Notify this department at once if for any reason in your opinion action is in error or charged to the wrong class.

Dated November 25, 1944 om.

At Olympia, Washington. Branch Office TAC.

Attending Physician John Shaughnesy,

Supervisor of Industrial Insurance.
By M. Gilbert (s)
Ass't. Claim Agent.

Mailed: Nov. 25, 1944

Department of Labor and Industries
Olympia

by LM (s).

(These findings and decision hereon are official and effective when and only when signed by the personal or facsimile signature of the Supervisor of Industrial Insurance and the personal signature of the claim agent or other person duly authorized.)

[fol. 31] IN AND BEFORE THE JOINT BOARD OF THE DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON

Claim No. 813023

In the Matter of the Application of Ralph Rowley for Reopening of his Claim and for Additional Compensation

EMPLOYER'S APPLICATION FOR REHEARING

Comes now Gange Lumber Company, a corporation, the employer affected by the order herein of the Supervisor of Industrial Insurance dated November 25, 1944, and respectfully shows the Joint Board:

1. That the above named claimant suffered an injury in extrahazardous employment on July 13, 1939 while in the employ of your petitioner on account of which he filed a claim with the Supervisor of Industrial Insurance for compensation under the Workmen's Compensation Act of the State of Washington; that by an order of the Supervisor of Industrial Insurance dated March 1, 1938, said claim was allowed and was closed with an award for the permanent partial disability suffered by the claimant as a result of said injury; that on July 13, 1937 and at all times thereafter until December 3, 1942, the Workmen's Compensation Act of the State of Washington (Laws of Washington, 1929, Chapter 138, Section 2 (h)), Rem. Rev. Stat., Section 7679 (h)) required that an application to reopen claimant's said claim on account of aggravation of his disability resulting from said injury and occurring after said closure of his claim, be filed, if at all, within three years after said closure, viz., within three years after March 1, 1938; that no application for such reopening was filed by claimant within said three-year period, nor at all until the claimant's application hereinafter mentioned was filed on March 19, 1943, and that the claimant's right to apply for reopening of his claim on account of any aggravation of his disability became barred and expired by lapse of time at the close of said three-year period.

Rec'd Nov. 27, 1944.

[fol. 32] 2. That Laws of Washington, 1941, Chapter 209, Section 1 (Rem. Rev. Stat., 1941 Supp., Section 7679 (h)), hereinafter called "the 1941 Act," became effective on

December 3, 1942; that said Act, as interpreted by the Supreme Court of the State of Washington in *Lane v. Department of Labor and Industries*, 121 Wash. Dec. (No. 11) 395, was intended to permit reopening of any industrial insurance claim theretofore closed, and whether or not the right to reopening thereof had theretofore expired by lapse of time, upon application for such reopening filed within five years after the effective date of said Act; that thereafter, on March 19, 1943, the above named claimant filed his application with the Supervisor of Industrial Insurance to reopen his claim and to award him additional compensation on the alleged ground that his disability had become aggravated after his claim was closed on March 1, 1938; that said Supervisor, by his order dated March 24, 1945, rejected said application upon the ground that the right to apply for reopening of said claim had become barred under the provisions of Rem. Rev. Stat., Section 7679 (h).

3. That on March 29, 1943, the claimant filed his application for rehearing by the above entitled Joint Board of the Supervisor's said order of March 24, 1943, contending that the 1941 Act operated to permit reopening of claimant's said claim notwithstanding that the right to apply for such reopening had become barred under the provisions of Rem. Rev. Stat., Section 7679 (h); that on April 5, 1943, the Joint Board entered its order denying said application and sustaining the Supervisor's said action, from which order the claimant duly appealed to the Superior Court of the State of Washington for Pierce County in its Cause No. 89046; that your petitioner, as the interested and affected employer in said proceeding and as provided by law, duly and regularly appeared as a party in said Court and Cause and [fol. 33] filed its motion therein for a dismissal of said Cause on the grounds that claimant's right to apply for reopening had expired by lapse of time as aforesaid, that the action of the Supervisor in rejecting claimant's said application for reopening and the action of the Joint Board in sustaining the Supervisor's decision were in accordance with law, that the 1941 Act was not intended to permit reopening of a barrel claim as urged by the claimant but that if said Act was so intended and so applied, it was to that extent in violation of the 14th Amendment to the Constitution of the United States and was unconstitutional and void in its application to your petitioner.

4. That judgment was thereafter entered by said Superior Court, on December 10, 1943, granting petitioner's said motion and dismissing claimant's appeal to said Court, from which judgment claimant appealed to the Supreme Court of the State of Washington in its Cause No. 29290; that claimant's said appeal was consolidated for hearing and decision with three other appeals pending in said Supreme Court and involving the same issue; that upon said appeal your petitioner contended that the 1941 Act was not intended to permit reopening of barred claims as urged by claimant but that if it was so intended and if it so applied, it was in violation of the 14th Amendment to the Constitution of the United States and was void as aforesaid; that thereafter, on August 30, 1944, the Supreme Court of the State of Washington filed its opinion in said consolidated causes (*Lane v. Department of Labor and Industries*, 121 Wash. Dec. (No. 11) 395) holding that the 1941 Act was intended to apply to barred claims as urged by claimant and that said Act was not unconstitutional as contended by your petitioner.

5. That thereafter your petitioner duly filed its petition to said Supreme Court for rehearing of its said decision, [fol. 34] which petition was denied by order of said Supreme Court dated October 4, 1944 (*Lane v. Department of Labor and Industries*, 121 Wash. Dec. (No. 16) 554), and judgment was thereafter entered, on October 9, 1944, by said Supreme Court remanding this cause and claim to the Superior Court of the State of Washington for Pierce County for further proceedings not inconsistent with said decision; that thereafter, on October 19, 1944, judgment was entered by said Superior Court reversing the aforesaid order of the Joint Board dated April 5, 1943 and directing the Department of Labor and Industries to consider claimant's said application for reopening on its merits and, after such consideration, to enter an order granting or denying said application, and if granting the same, to award to the claimant the additional compensation to which he might appear to be entitled; and that thereafter the Joint Board entered its order directing the Supervisor of Industrial Insurance to comply with said judgment of the Superior Court.

6. That thereafter, the Supervisor of Industrial Insurance, having caused an investigation to be made of the extent of the claimant's permanent partial disability, and

having determined that said disability had become aggravated after the claimant's claim was closed on March 1, 1938, entered an order dated November 25, 1944 reopening the claimant's said claim and awarding him additional compensation on account of the aggravation of said disability.

7. That, notwithstanding the aforesaid decision of the Supreme Court of the State of Washington, the 1941 Act, as interpreted by said Supreme Court as aforesaid, and said order of the Supervisor of Industrial Insurance dated November 25, 1944 entered pursuant thereto, insofar as said Act and order provide for an award to the claimant although his right to apply for or receive such an award had once [fol. 35] become barred, and insofar as said Act and order require the amount of such award to be charged to your petitioner's cost experience under said Workmen's Compensation Act, constitute a taking of the property of your petitioner without due process of law and deny your petitioner the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States and are void.

Wherefore, your petitioner, deeming itself aggrieved by said order of the Supervisor of Industrial Insurance dated November 25, 1944, and believing the same and the award directed thereby to be unjust and unlawful, respectfully petitions that the Joint Board grant a rehearing of said order and, after such rehearing, that the Joint Board enter an order reversing said order of the Supervisor of Industrial Insurance and directing that the claimant's said application for reopening of his claim be dismissed.

T. J. Hanify (s); Grosscup, Morrow & Ambler (s); L. B. Donley (s); Hulbert, Helsell & Paul (s); Little, Leader, LeSourd & Palmer (s); Laube & Laughlin, Attorneys for Petitioner, Gange Lumber Company.

Address: 812 Hoge Building, Seattle 4, Washington.

[fol. 36] IN AND BEFORE THE DEPARTMENT OF LABOR AND INDUSTRIES, STATE OF WASHINGTON

Joint Board

Dated November 27, 1944.
At Olympia, Washington.

Gange Lumber Co.
320 Perkins Building
Tacoma, Washington

Claimant—Ralph Rowley

ORDER DENYING APPLICATION FOR REHEARING

Claim No.	Firm No.	Class	Date Injured
813023	55397	10-2	7-13-27

On this date, the complete record of the above claim being presented to the Joint Board in Executive Session and the Joint Board having carefully and thoroughly considered such record *together with all evidence offered in the matter, and you being hereby notified,* now:

It is Hereby Ordered That whereas it appears to the Board that this claim has heretofore been appealed to the Supreme Court of the State of Washington and that said Court held upon said appeal, in *Lane v. Department of Labor and Industries,* 121 Wash. Dec. (No. 11) 395, that the claimant herein was entitled to a consideration of his application for reopening on its merits under Laws of Washington, 1941, Chapter 209, Section 1, and that said law was not in violation of the 14th Amendment to the Constitution of the United States as contended by the employer herein, and the Joint Board being advised in the premises, and you being hereby notified, now:

It Is Hereby Ordered That the application of the employer, Gange Lumber Company, for a rehearing of the order of the Supervisor of Industrial Insurance dated November 25, 1944, be and the same is hereby denied.

Joint Board, Robert H. Harlin, Director; John Shaughnessey, Supervisor of Industrial Insurance;

Jno. E. Morgan, Supervisor of Safety; Riley R. Zumwalt Sr. (S)., Secretary.

cc to: Mr. T. J. Hanify, Attorney at Law, Hoge Building, Seattle 4, Washington.
cc to: Mr. Ralph Rowley, c/o E. E. Stark, P. O. Box 985, Olympia, Washington.
Joint Board. Mailed Nov. 27, 1944.
RK (S.)
(RRZ:RK)

[fol. 37] IN SUPERIOR COURT OF PIERCE COUNTY

No. 89046

Appeal to Superior Court

(Claim No. 815025) 813023

GANGE LUMBER COMPANY, a Corporation, Plaintiff,

vs.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendants

NOTICE OF APPEAL—Filed November 30, 1944

To the above named Ralph Rowley and
To the Department of Labor and Industries of the State of Washington, and to the Joint Board thereof, consisting of Robert H. Harlin, Director of the Department of Labor and Industries; John Shaughnessy, Supervisor of Industrial Insurance, and John E. Morgan, Supervisor of Safety:

You and Each of You will please take notice that the plaintiff above named, feeling aggrieved at the entry of the order of the Joint Board, dated November 27, 1944, ordering that the application of the above named Gange Lumber Company for a rehearing of the order herein of the Supervisor of Industrial Insurance, dated November 25, 1944, be denied, hereby appeals to the Superior Court of the State of Washington for Pierce County, the county of residence of the plaintiff and the defendant Ralph Row-

ley, from the whole and each and every part of said order of the Joint Board dated November 27, 1944.

T. J. Hanify, Grosscup, Morrow & Ambler, L. B. Donley, Hulbert, Helsell & Paul, Little, Leader, LeSourd & Palmer, Laube & Laughlin.

Address: 812 Hoge Building, Seattle 4, Wash.

[fol. 38] Service of the foregoing Notice of Appeal and receipt of a copy thereof is hereby acknowledged this 28th day of November, 1944.

Robert H. Harlin, Director of Department of Labor and Industries.

Received Nov. 28, 1944. Dept. of Labor and Industries, Olympia, Washington.

[File endorsement omitted.]

[fols. 39-42] In Superior Court of Pierce County

[Title omitted]

Plaintiff's Motion for Judgment on the Record—Filed December 5, 1944

Comes now the Plaintiff, Gange Lumber Company, a corporation, the Employer affected by the order herein of the Supervisor of Industrial Insurance dated November 25, 1944, and the order of the Joint Board of the Department of Labor and Industries dated November 27, 1944 sustaining said order of the Supervisor of Industrial Insurance, and moves the Court for judgment reversing said order of the Joint Board dated November 27, 1944, and directing that the said order of the Supervisor of Industrial Insurance dated November 25, 1944 be reversed, and that the application herein of the defendant Ralph Rowley for reopening of his industrial claim be denied.

This motion is based upon the records and files herein and in cause No. 89046 of this court, and upon the following facts appearing from said records and files:

* * * * * * *

[fol. 43] 7. That, notwithstanding the aforesaid decision of the Supreme Court of the State of Washington, the 1941

Act, as interpreted by said Supreme Court as aforesaid, and said order of the Supervisor of Industrial Insurance dated November 25, 1944 and the said Joint Board dated November 27, 1944 entered pursuant thereto, insofar as said Act and orders provide for an award to the defendant Rowley although his right to apply for or receive such an award had once become barred, and insofar as said Act and orders required the amount of such award to be charged to plaintiff's cost experience under said Workmen's Compensation Act, constitute a taking of the property of plaintiff without due process of law and deny plaintiff the equal [fol. 44] protection of the laws in violation of the 14th Amendment to the Constitution of the United States and are void.

T. J. Hanify, Grosscup, Morrow & Ambler, L. B. Donley, Hulbert, Helsell & Paul, Little, Leader, LeSourd & Palmer, Laube & Laughlin, Attorneys for Plaintiff.

[File endorsement omitted.]

Address: 812 Hope Building, Seattle, Wash.

Service of the foregoing Motion and receipt of a copy thereof is hereby acknowledged this 3rd day of December, 1944.

Allen & Carey, Attorneys for defendant Ralph Rowley. Smith Troy, Attorney General. Harry L. Parr, Assistant Attorney General, Attorneys for defendant Department of Labor and Industries.

[fol. 45] In Superior Court of Pierce County

[Title omitted]

Defendants' Motions for Judgment of Dismissal—Filed December 5, 1944

Come now the defendants Ralph Rowley and Department of Labor and Industries of the State of Washington, and move the Court for a judgment of dismissal of the

appeal of the plaintiff Gange Lumber Company herein with prejudice on the following grounds and for the following reasons:

1. That this cause was heretofore appealed to this court in its cause No. 89046 by the defendant Ralph Rowley from an order of the Joint Board of the Department of Labor and Industries, dated April 5, 1943, affirming an order of the Supervisor of Industrial Insurance, dated March 24, 1943, dismissing an application of the defendant Ralph Rowley to said Department for a reopening of his industrial insurance claim herein; that judgment was entered by this court on December 10, 1943 upon said appeal of the defendant Ralph Rowley confirming the said order of the Joint Board dated April 5, 1943.

2. That thereafter, the defendant Ralph Rowley appealed from said judgment to the Supreme Court of the State of Washington in its cause No. 29290, which appeal was consolidated for hearing and decision with three other causes in said Supreme Court, and was thereafter decided by said Court in *Lane v. Department of Labor and Industries*; [fol. 46] 121 Wash. Dec. (No. 11) 395, wherein judgment was entered on October 9, 1944 reversing said judgment of this court dated December 10, 1943 and remanding this cause to this court with directions that the industrial insurance claim of the defendant Ralph Rowley herein be considered by the defendant Department of Labor and Industries upon its merits; that pursuant to said judgment of the Supreme Court of the State of Washington, a judgment was entered by this court in said cause No. 89046 on October 19, 1944 remanding this cause to the defendant Department of Labor and Industries for proceedings consistent with said decision of the Supreme Court of Washington; that pursuant to said judgment of this Court the Joint Board of the defendant Department of Labor and Industries entered its order directing the Supervisor of Industrial Insurance to consider the defendant Ralph Rowley's claim upon its merits, and that pursuant thereto the said Supervisor considered said claim and, after an investigation, entered an order, dated November 25, 1944, awarding the defendant Ralph Rowley certain compensation on account of an aggravation of his physical disability.

3. That the plaintiff Gange Lumber Company thereafter filed its application to the Joint Board of the defendant

Department of Labor and Industries for a rehearing of said order of the Supervisor of Industrial Insurance dated November 25, 1944; that said application was denied by said Joint Board by order dated November 27, 1944, from which order the plaintiff Gange Lumber Company has taken the present appeal herein to this court.

4. That no issue of fact is raised in this cause and that the only issue of law raised by the plaintiff Gange Lumber Company in its said application for rehearing to said Joint Board and now before this Court is the issue of whether the Laws of Washington, 1941, Chapter 209, Section 1, as it applies to the plaintiff herein is in violation of the [fol. 47] 14th Amendment to the Constitution of the United States; that said issue was raised between the parties hereto upon the aforesaid appeal of the defendant Ralph Rowley to the Supreme Court of the State of Washington in *Lane v. Department of Labor and Industries, supra,* and was decided by said Supreme Court upon said appeal adversely to the contention therein and herein of the plaintiff Gange Lumber Company, and that said decision of the Supreme Court of Washington is a determination of said issue which is now conclusive upon this court in favor of the defendants herein and against the plaintiff Gange Lumber Company.

These motions are based upon the records and files herein and in said Cause No. 89046.

Allen & Carey, Attorneys for Defendant Ralph Rowley. Smith Troy, Attorney General; Harry L. Parr, Assistant Attorney General, Attorneys for Defendant Department of Labor and Industries.

Service of the foregoing Motions and receipt of a copy thereof is hereby acknowledged this 3rd day of December, 1944.

T. J. Hanify, Of Attorneys for Plaintiff, Gange Lumber Company.

[fol. 48] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR PIERCE COUNTY

No. 89046

GANGE LUMBER COMPANY, a Corporation, Plaintiff,

v.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendants

ORDER GRANTING DEFENDANTS' MOTIONS FOR DISMISSAL AND JUDGMENT OF DISMISSAL—Filed December 5, 1944

This cause coming on regularly for hearing in open court this 5th day of December, 1944, upon the motion of the plaintiff Gange Lumber Company for judgment on the record and upon the motions of the defendants Ralph Rowley and Department of Labor and Industries of the State of Washington for judgment of dismissal, plaintiff appearing by Mr. T. J. Hanify, one of its attorneys, the defendant Ralph Rowley by Mr. Charles R. Carey, one of his attorneys, and the defendant Department of Labor and Industries of the State of Washington by Mr. Harry L. Parr, Assistant Attorney General, one of its attorneys, and it appearing to the Court that no issue of fact has been or is raised herein and that the only issue of law herein is whether Laws of Washington, 1941, Chapter 208, Section 1, insofar as it permits the reopening of the industrial insurance claim of the defendant Ralph Rowley and the award made to said defendant upon such reopening by the order herein of the Supervisor of Industrial Insurance dated November 25, 1944, and the charging of the amount of said award to the cost experience of the plaintiff Gange Lumber Company under the Workmen's Compensation Act of the State of Washington, constitutes a taking of the property of the plaintiff Gange Lumber Company without due process of law and denies said plaintiff the equal protection [fol. 49] of the laws in violation of the 14th Amendment to the Constitution of the United States; and

It appearing further to the Court that this cause has heretofore been before the Court in its Cause No. 89046 wherein judgment was entered on December 10, 1943, from which judgment the defendant Ralph Rowley appealed to the Supreme Court of Washington; that said appeal was con-

solidated with three other causes upon appeal before said Court and was decided in *Lane v. Department of Labor and Industries*, 121 Wash. Dec. (No. 11) 395; that the aforesaid issue of law was raised between the parties hereto in said appeal and was decided therein by said Supreme Court adversely to the present contention of the plaintiff herein; and

The Court being of the opinion that said decision of the Supreme Court of Washington is a determination of the aforesaid issue of law which is conclusive upon this Court in favor of the defendants and against the plaintiff, and the Court being advised in the premises,

It Is Therefore, Ordered, Adjudged and Decreed, That the aforesaid motion of the plaintiff for judgment upon the record be, and the same is hereby denied and that the motions of the defendants Ralph Rowley and Department of Labor and Industries of the State of Washington be, and each thereof is hereby granted, to all of which the plaintiff excepts and its exception is allowed; and

It Is Further Ordered, Adjudged and Decreed that this cause and the plaintiff's appeal herein be, and the same are hereby dismissed with prejudice; that the aforesaid order of the Joint Board dated November 27, 1944 be, and the same is hereby confirmed.

[fol. 50] Done in Open Court this 5th day of December, 1944.

E. F. Freeman, Judge.

Presented by: Charles R. Carey, of Attorneys for defendant Ralph Rowley; Harry L. Parr, Assistant Attorney General, of Attorneys for defendant Department of Labor and Industries.

Approved as to form: T. J. Hanify, of Attorneys for Plaintiff.

[fol. 51] [File endorsement omitted]

IN SUPERIOR COURT OF PIERCE COUNTY

[Title omitted]

NOTICE OF APPEAL TO SUPREME COURT—Filed December 5, 1944

To the defendant Ralph Rowley and to Allen & Carey, his attorneys; and

To the defendant Department of Labor and Industries of the State of Washington and to Smith Troy, Attorney General and Harry L. Parr, Assistant Attorney General, its attorneys:

You and each of you will please take notice that Gange Lumber Company, a corporation, the above named plaintiff, feeling itself aggrieved by the judgment in the above entitled case dated December 5, 1944, does hereby appeal to the Supreme Court of the State of Washington from said judgment and from the whole and each and every part thereof.

T. J. Hanify; Grosscup, Morrow & Ambler; L. B. Donley; Hulbert, Helsell & Paul; Little, Leader, LeSourd & Palmer; Laube & Laughlin, Attorneys for Plaintiff.

Service of the foregoing Notice of Appeal and receipt of a copy thereof on December 5, 1944, is hereby acknowledged.

Allen & Carey, Attorneys for Defendant Ralph Rowley.

Service of the foregoing Notice of Appeal and receipt of a copy thereof on December 5, 1944, is hereby acknowledged.

Smith Troy, Attorney General; Harry L. Parr, Assistant Attorney General, Attorneys for Deft. Dept. of Labor & Industries.

[fol. 52] [File endorsement omitted]

No. 29541

IN SUPREME COURT OF WASHINGTON

GANGE LUMBER COMPANY, a Corporation, Plaintiff and Appellant,

vs.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendants and Respondents

Appeal from the Superior Court for Pierce County

Honorable E. F. Freeman, Judge Presiding

APPELLANT'S BRIEF—Filed December 30, 1944

ASSIGNMENTS OF ERROR

1. The Superior Court, in following the decision in *Lane et al. v. Department of Labor and Industries*, 121 Wash. Dec. (No. 11) 395 erred in holding that Laws of Washington, 1941, Chapter 209, Section 1, applies retroactively to permit reopening of Respondent Rowley's claim notwithstanding that his right to apply for such reopening had become barred and expired under Rem. Rev. Stat., Section 7679 (h).

2. The Superior Court, in following said decision in the *Lane* cases, erred in holding that said Laws of Washington, 1941, Chapter 209, Section 1, insofar as said statute purports to revive the respondent Rowley's statutory right to apply for reopening of his industrial insurance claim, does not deprive appellant of its property without due process of law or deny appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington, and said court erred in failing to hold that said statute does so deprive appellant of its property and does deny it the equal pro-
[fol. 53] tection of the laws.

3. The Superior Court, in following said decision in the *Lane* cases, erred in holding that the removal by said Laws

of Washington, Chapter 209, Section 1, of the bar of limitations to the reopening of the respondent Rowley's claim affected only said respondent's remedies under the Workmen's Compensation Act of the State of Washington and did not affect the substantial rights of the appellant, and said court erred in failing to hold that said removal did affect the appellant's substantial rights.

4. The Superior Court, in following said decision in the *Lane* cases, erred in holding that the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3 of the Constitution of the State of Washington does not apply to a law, *viz.*, Laws of Washington 1941, Chapter 209, Section 1, enacted in the exercise of the police power of a State.

5. The Superior Court, in following said decision in the *Lane* cases, erred in holding that the contributions of premiums exacted of an employer by the Workmen's Compensation Act of the State of Washington and paid by the employer into the accident fund maintained by the respondent Department of Labor and Industries under said Act are a license or excise tax.

6. The Superior Court erred in confirming the decision of the Joint Board of the respondent Department of Labor and Industries, affirming the action of the Supervisor of Industrial Insurance in reopening respondent Rowley's claim and allowing him additional compensation.

7. The Superior Court erred in denying appellant's motion for judgment on the record.

8. The Superior Court erred in granting respondents' motions for judgment of dismissal.

9. The Superior Court erred in entering judgment dismissing appellant's appeal to said court with prejudice.

• • • • • • • •

[fol. 54] IN SUPREME COURT OF WASHINGTON

No. 29541

[Title omitted]

APPELLANT'S PETITION FOR REHEARING—Filed February 8, 1945

* * * * * * *

II. *Constitutionality of the Act*

If the court's interpretation of the 1941 Act is to stand, then we urge once more that the Act, as it applies to the employer in this case, deprives the employer of its property without due process of law and denies it the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington. This conclusion is not only sound but, we submit, is compelled by the decision of the Supreme Court of the United States in *William Danzer & Co.* v. *S. I. R. Co.*, 268 U. S. 633, 45 S. Ct. 612, 69 L. ed. 1126.

* * * * * * *

[File endorsement omitted.]

[fol. 55] IN SUPREME COURT OF WASHINGTON

No. 29541

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed February 16, 1945

The court having considered the appellant's petition for a rehearing herein,

It Is Ordered that the petition for rehearing be and it is hereby denied.

Dated this 16th day of February, 1945.

By the Court:

Walter B. Beals, Chief Justice.

[File endorsement omitted.]

[fol. 56] IN SUPREME COURT OF WASHINGTON

No. 29541

Pierce County No. 89046

GANGE LUMBER COMPANY, a corporation, Appellant,

vs.

RALPH ROWLEY and DEPARTMENT OF LABOR and INDUSTRIES OF THE STATE OF WASHINGTON, Respondents

JUDGMENT—February 19, 1945

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Pierce County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 19 day of February, A. D. 1945, on motion of Allen & Carey, and Smith Troy, Attorney General, of counsel for respective respondents, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with cost; and that the said Ralph Rowley have and recover of and from the said Gange Lumber Company the costs of this action taxed and allowed at Fifty-four and 05/100 ($54.05) dollars, and that execution issue therefor;

And that the said Department of Labor and Industries of the State of Washington have and recover of and from the said Gange Lumber Company the costs of this action taxed and allowed at Forty-two and no/100 ($42.00) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fols. 57-82] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 29288

I. C. LANE, Appellant,

v.

DEPARTMENT OF LABOR and INDUSTRIES OF THE STATE OF WASHINGTON and DEFIANCE LUMBER COMPANY, a corporation, Employer, Respondents.

No. 29289

I. C. LANE, Appellant,

v.

DEPARTMENT OF LABOR and INDUSTRIES OF THE STATE OF WASHINGTON and GANGE LUMBER COMPANY, a corporation, Employer, Respondents.

No. 29290

RALPH ROWLEY, Appellant,

v.

DEPARTMENT OF LABOR and INDUSTRIES OF THE STATE OF WASHINGTON and GANGE LUMBER COMPANY, a corporation, Employer, Respondents.

No. 29291

En Banc

(Consolidated)

JOHN MOORE, Respondent

v.

DEPARTMENT OF LABOR and INDUSTRIES OF THE STATE OF WASHINGTON, Defendant, and Northwest Door Company, Employer, Appellant.

OPINION—Filed August 30th, 1944

[fol. 83] This appeal involves the claims of injured workmen for compensation for aggravation of injuries and for

which they had previously received awards. In the two cases of I. C. Lane and in that of Ralph Rowley, the court affirmed the orders of the department of Labor and Industries disallowing the claims on the ground that they had not been made within the time limited by law. In the case of John Moore, the court reversed the order of the department disallowing his claim upon the same ground. On appeal to this court the cases were consolidated. The parties to the appeal will be referred to as the claimants, the employers, and the department.

The questions to be determined are whether the act of 1941 applies to barred claims, and, if so, is it constitutional.

The original act of 1911, chapter 74, p. 345, by § 5(h), p. 360, provided as follows:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments."

No limitation of time was fixed within which the workman was required to make application to the department of labor and industries. The law remained in this condition until the enactment of chapter 310, Laws of 1927, p. 813, when § 4(h), p. 844, was amended so as to place a limitation of three years upon the making of a claim for compensation for aggravation of injuries. This amended section was carried forward into chapter 132, Laws of 1929, p. 338, § 2. It was again amended by chapter 209, Laws of 1941 (referendum measure 22), p. 633, § 1 (Rem. Supp. 1941, § 7679), and now reads as follows:

[fol. 84] "If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the Director of Labor and Industries, through and by means of the Division of Industrial Insurance, may, upon the application of the beneficiary, made within five years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accord-

ance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided*, Any such applicant whose compensation has heretofore been established or terminated shall have five (5) years from the taking effect of this act within which to apply for such readjustment."

At the time this act became effective all of the claims now under consideration were barred by the three-year limitation period.

It is a general rule that a statute fixing a time limitation upon the assertion of a right or the enforcement of an obligation will not be held *by construction* to operate retroactively, and it will be deemed so to operate only when, by its plain terms or by necessary implication, such intention is apparent. It is not necessary, however, that the statute expressly state in words that it shall so operate, or that rights or obligations already barred shall be revived, but it is sufficient if the plain words of the statute carry such meaning and leave no room for doubt.

We have in many cases applied the rule that, where the language of a statute is plain and clear and capable of but one meaning, there is no room for construction and none is needed. *State ex rel. George* v. *Seattle*, 184 Wash. 560, 52 P. (2d) 360; *Carkonen* v. *Alberts*, 196 Wash. 575, 83 P. (2d) 899; *Shelton Hotel Co., Inc.*, v. *Bates*, 4 Wn. (2d) 498, 104 P. (2d) 478; *Smith* v. *Department of Labor & Industries*, 8 Wn. (2d) 587, 113 P. (2d) 57. A very clear and comprehensive statement of the rule is found in 50 Am. Jr. (Statutes) 204, § 225, as follows:

"A statute is not open to construction as a matter of course. It is open to construction only where the language used in the statute requires interpretation, that is, where the statute is ambiguous, or will bear two or more construc- [fol. 85] tions, or is of "such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The

plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity."

The legislature has used the language quoted above three different times: in 1927, 1929 and 1941. Each time it spoke on the subject matter involved in the workmen's compensation act it was carrying out a social objective, namely, to give further relief to injured workmen than had been given by previous legislation in view of recognized changed economic conditions. In doing so there could be no reason for any discrimination between injured workmen. The one whose compensation has once been established or terminated but who has not made claim for aggravation of his injuries within the three-year period prescribed, is just as much in need of aid as is one who has done so, or as one who might later make such a claim; and as the legislature did not affirmatively exclude such injured workman, it is very clear that the plain language of this statute is all inclusive. If the statute stopped at the proviso, then all that this court has said about applying statutes of limitation prospectively and that the law in force at the time the claim of an injured workman accrued must govern, would be applicable. It would seem as though the lawmakers sensed this and, to avoid such effect, added the proviso: "*Any* such applicant whose compensation has *heretofore* been established or terminated shall have five (5) years *from the taking effect of this act* within which to apply for such readjustments." (Italics ours.)

[fol. 86] We, therefore, hold that the act applies to the claims of the claimants, and that they were timely made.

On the constitutional question raised by the employers, we must take into consideration the type of statute that is now before us and bear in mind that it is a part of the legislation enacted pursuant to the police power of the state.

The employers assert that after a claim of the kind before us is once barred, it cannot be revived by subsequent legislation because a right of immunity in favor of

the employer arises which constitutes a vested right and its impairment is protected by constitutional inhibitions. The claimants and the attorney general contend that the act relates only to the remedy of the workman and does not affect any vested right of the employer. Many authorities are cited by the respective counsel. There is a conflict of authority on the general subject, but much of it disappears when the nature and scope of the different statutes are considered.

There are two types of statutes which the courts had to apply. One of them is the statute which either by its plain terms or by the construction given it by the court makes the limitation of time inhere in the right or obligation rather than the remedy. It is sometimes referred to as a statute of non-claim, and, strictly speaking, is not a statute of limitations at all. In its usual form the statute creates some right or obligation and a time is fixed within which the right must be asserted or the obligation sought to be enforced, or the same will be barred. When the limitation period expires the right or obligation is extinguished and cannot be revived by a subsequent statute enlarging the time limitation. Illustrations of non-claim statutes in this state are those providing for liens of laborers and materialmen, claims against estates of [fol. 87] deceased persons, and claims for damages against municipal corporations.

The courts seem to be in substantial accord that a statute of limitations cannot enlarge the time for the commencement of an action when the time limitation therefor is fixed by contract; also in cases where one has been in possession of property for the period required to bar an action by the real owner for its recovery, the theory being that, by the lapse of the statutory time, title to the property has passed and it cannot be divested by a statutory revival of the right of action to recover its possession. This court has held that the right to enforce a lien for street improvements cannot be enlarged by statute after the time limit therefor has expired. *Seattle* v. *DeWolfe*, 17 Wash. 349, 49 Pac. 553. In *Earle* v. *Froedtert Grain & Malting Co.*, 197 Wash. 341, 85 P. (2d) 264, and *Peoples* v. *Hayes*, 4 Wn. (2d) 253, 104 P. (2d) 305, it was decided, with reference to a statute relating to actions to recover on the ground of unlawful preferences, that it is not in its strict sense one of limitation at all,

but one that goes to the right to recover, and not merely to the remedy. This is the theory of the leading case of *William Danzer & Co.* v. *Gulf & S. I. R. Co.*, 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126, relied on by counsel for the employers.

The other type of statute is one which relates only to the remedy and has nothing to do with any right or obligation, does not inhere in either, and is wholly independent of them. It is a statute of limitations in its strict sense, and, although a remedy may become barred thereunder, the right or obligation is not extinguished. It is a statute of repose.

There is no constitutional inhibition against the revival of a barred remedy. The leading case on the subject is *Campbell* v. *Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483. [fol. 88] We have adopted and followed the rule of that case in *Herr* v. *Schwager*, 145 Wash. 101, 258 Pac. 1039. The distinctions between the different types of statutes as bearing upon the question of whether a claim against which a limitation has run can be revived by a subsequent limitation statute, will be found in the annotations and the cases to which they are appended in 36 A. L. R. 1316, 46 A. L. R. 1101, 67 A. L. R. 297, 78 A. L. R. 1294, 133 A. L. R. 384.

There are cases contrary to *Campbell* v. *Holt* and *Herr* v. *Schwager* which hold that, if the remedy is barred, the immunity from suit is a right that cannot be impaired by a statute of revival, but we definitely declined in the *Herr* case to follow them, and we have not departed from the doctrine of that case.

A claim of a workman of the kind before us is a personal one for a further allowance out of the accident fund, and when the nature of the fund is analyzed and the relationship to it of an employer and an injured workman is considered, it readily appears that the act before us is not in any sense a statute of nonclaim, but is of a character such as to have applicable to it the doctrine of the case of *Herr* v. *Schwager*.

When the original act of 1911 came before the court it was decided that the money an employer paid into the accident fund was a license tax on his privilege to carry on his business. *State ex rel. Davis-Smith Co.* v. *Clausen*, 65 Wash. 156, 117 Pac. 1101. This view was approved in

Mountain Timber Co. v. *State of Washington*, 243 U. S. 219, 237, 61 L. Ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642, in which it is said:

"In the present case the Supreme Court of Washington (75 Washington, 581, 583), sustained the law as legitimate exercise of the police power, referring at the same time to its previous decision in the *Clausen Case*, 65 Washington, 156, 203, 207, which was rested principally upon that power, but also (pp. 203, 207), sustained the charges imposed upon employers engaged in the specified industries as possessing the character of a license tax upon the occupation, partaking of the dual nature of a tax for revenue and a tax for purposes of regulation."

[fol. 89] We followed this viewpoint in *State* v. *Vinther*, 176 Wash. 391, 29 P. (2d) 693; and the same thought is the basis of *State ex rel. Crabb* v. *Olinger*, 196 Wash. 308, 82 P. (2d) 865.

The workmen's compensation act and its amendments is an exercise of the police power of the state and in their enactment the legislature did not encounter many of the constitutional limitations it might have otherwise. *Raymond Lumber Co.* v. *Raymond Light & Water Co.*, 92 Wash. 330, 159 Pac. 133; *Shea* v. *Olson*, 185 Wash. 143, 53 P. (2d) 615. In the latter case we said, p. 153:

"We next consider the provisions of Art. I, §§ 3 and 12 of the state constitution and the fourteenth amendment of the United States constitution, relating to due process and the equal protection of the laws.

"None of these constitutional provisions apply to laws enacted by a state legislature in the exercise of its police powers. We have repeatedly so held. (Citing authorities.)"

The fact that an employer has a right to appear and contest a claim of an injured workman and to take an appeal from an adverse decision does not give him any right in or to the accident fund, and we have never held that he has any so-called vested right therein. The reason he may contest a claim is that his cost experience would be affected by an unlawful use of the fund. When it is finally decided that a claimant is entitled to compensation, all further interest on the part of the employer ceases, and

all procedural and administrative questions are of no concern of his, but lie only between the claimant and the department.

The act took away from the workman his common-law right of action for negligence. In its place it provided for industrial insurance. The employer is taxed to create and maintain an accident fund. The state administers the fund through one of its agencies. The act creating the right of the workman to compensation fixed a time limit within which he must make his claim after the day upon [fol. 90] which the injury occurred, or the right thereto accrued, and provided that if he did not do so such claim would not be enforcible; but it did not fix any time limit within which an injured workman whose rate of compensation had been established or his compensation had been terminated might apply for an adjustment in the event of aggravation of his injury thereafter. Provision was made that the department might, "upon its own motion readjust for further application the rate of compensation . . ." The law remained this way until 1927, when it was provided that a workman claiming aggravation must make claim therefor within a three-year period.

The employer has never had anything to say about when a claim for aggravation of injury may be made, and the fact that after sixteen years of operation of the law the legislature decided to require the injured workman claiming aggravation to make his claim within a limited time, did not change the status of the employer with reference to the accident fund. It did not thereby create a statute of nonclaim. It merely affected the remedy of the injured workman. It was enacted for the benefit of the department so that it would not have to consider stale claims, when perhaps the securing of evidence as to their merit might be difficult or impossible. The claim of the workman is not one against the employer and the limitation period was not made for the employer's benefit.

The limitation periods fixed by the acts of 1927, 1929 and 1941 have no relation to the right to a readjustment of compensation created by the act of 1911, and do not inhere therein, but relate only to the remedy of the claimant. The lapse of time limitation does not build up any immunity in favor of the employer or bring into being any vested right that can be affected if the time limitation is changed. We held in *Matson* v. *Department of Labor &*

[fol. 91] *Industries*, 176 Wash. 345, 29 P. (2d) 675, that no vested right of an injured workman was affected when a limitation period was provided where none had existed before, and the same authority exists to enlarge the time for making claims for readjustment, and, for the same reasons given in that case, no vested right of an employer would be affected.

The act of 1941 before us is so plain and all inclusive in its wording as not to need construction. It applies to all applicants for readjustment whose compensation has been established or terminated, and in passing it the legislative authority has encountered no constitutional inhibitions.

The judgments in the Lane and the Rowley cases are reversed, and the judgment in the Moore case is affirmed.

Grady, J.

We concur: Beals, J.; Steinert, J.; Blake, J.; Robinson, J.; Jeffers, J.; Mallery, J.

I dissent: Simpson, C. J.

[fol. 92] DISSENTING OPINION

MILLARD, J. (dissenting):

While engaged in extrahazardous work in the employ of Defiance Lumber Company, I. C. Lane sustained an injury in January 1927, for which he was allowed compensation by the department of labor and industries and his claim was closed by a departmental order February 28, 1927, from which he did not appeal. Lane applied, January 26, 1943, to the department for a reopening of his claim on the ground that his disability had become aggravated since his claim was closed. The application was denied for the reason that the right to a reopening of the claim was barred under the three-year limitation included in the industrial insurance statute since 1927. Lane then applied for a rehearing before the joint board of the department on the ground that referendum measure No. 22 adopted at the general election November 3, 1942, permitted reopening of a claim upon an application made at any time within five years after the effective date of the measure, despite the fact that the claim was barred before that date. From the order entered by the joint board denying the petition the claimant appealed to the superior court for

Pierce county, which affirmed the decision of the department. Plaintiff appealed.

In the second cause Lane was injured in 1935 while engaged in extrahazardous work in the employ of Gange Lumber Company. His claim was closed by the department in January 1936. In 1943 Lane's application for reopening of his claim was denied and on his appeal to the superior court from the order of the joint board denying his petition for rehearing he was unsuccessful. From that judgment plaintiff has appealed.

In the third case Ralph Rowley sustained an injury while engaged in extrahazardous work in the employ of Gange Lumber Company. His claim was closed in 1938 and no steps were taken by him for reopening of the claim until 1943. The procedure in his case is the same as in the Lane cases and he appealed from the judgment of the superior court affirming the order of the department denying his application.

[fol. 93] In the fourth case John Moore was injured in 1937 while engaged in extrahazardous work in the employ of Northwest Door Company. His claim was closed March 7, 1939. His application filed in 1943 for reopening of the claim was rejected. An order was entered by the joint board denying his petition for rehearing. His appeal to the superior court from that order resulted in entry of a judgment reversing the order of the department and remanding the cause for reconsideration of application for reopening the claim on its merits. From that judgment the employer appealed.

The original workmen's compensation act (Laws of 1911, Chapter 74, § 5 (h), p. 360) provided

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments."

It will be noted that the statute did not impose any limitation of time upon the right of a claimant to apply for a reopening of his claim on the ground of aggravation of his disability.

The foregoing was not changed until 1927. By laws of 1927, chapter 310, § 4, (h), p. 844 the statute was amended to limit to three years the time within which a claimant might apply for a reopening of his claim on the ground of aggravation of disability. The amended statute reads as follows:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided,* Any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment."

The foregoing was reenacted without any change by Laws of 1929, chapter 132, § 2(h), p. 338 and remained the same (Rem. Rev. Stat., § 7679 (h)) until Laws of 1941, chapter [fol. 94] 209, p. 624 subsequently approved by the people as referendum measure No. 22 became effective December 3, 1942. The only changes made by referendum No. 22 in the aggravation provision of the 1927 statute, as reenacted in 1929, were to substitute the words "five years" for the words "three years" in the body of subsection (h) and to substitute the words "five (5) years" for the words "three years" in the proviso. The subdivision reads as follows:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the Director of Labor and Industries, through and by means of the Division of Industrial Insurance, may, upon the application of the beneficiary, made within five years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided,* Any such applicant

whose compensation has heretofore been established or terminated shall have five (5) years from the taking effect of this act within which to apply for such readjustment."

In the Lane and Rowley cases the superior court held that referendum No. 22 was not intended to apply retroactively and therefore granted the employers' motions to dismiss the appeals of the claimants. In the Moore case the court denied the employer's motion and entered judgment reversing the order of the department.

The employers contend

"(1) that those who enacted Referendum No. 22 did not intend it should apply retroactively so as to allow reopening of claims barred by limitation of time when the Measure became effective, and that it therefore does not so apply; but (2) if it would so apply, then it is unconstitutional."

The employers concede that referendum No. 22 was intended to apply retroactively so as to extend the time for reopening all claims not barred on the effective date of the referendum measure.

It is the position of claimants that the meaning of the proviso that "Any such applicant whose compensation has [fol. 95] heretofore been established or terminated shall have five (5) years from the taking effect of this act within which to apply for such readjustment" is clear, hence there is nothing to construe; that is, the legislature plainly intended that the five-year statute should apply retroactively so as to permit reopening of claims barred by three-year statute of limitations when amendatory five-year statute became effective.

It is argued that such retroactive application will not render the statute unconstitutional as the method of reopening claims is a matter of practice, procedure, and remedy and does not affect any contractual or vested right of employer, employees or the department of labor and industries. It is further insisted that the act is an exercise of the police power of the state and that the power of the state to impose such a license tax upon the industries in furtherance of the state's public policy in caring for workmen injured in industries may not be successfully challenged.

All statutes must be interpreted before they can be applied, hence all statutes are subject to construction, and if there be more than one possible construction, that mean-

ing will be adopted which most reasonably seems to be the one intended by the legislature. See Crawford, Statutory Construction, p. 283, § 175.

It must be presumed that the members of the legislature are familiar with the doctrine announced by this court in Packscher v. Fuller, 6 Wash. 534, 33 Pac. 875, and consistently followed by us for more than a half century, that where a statute of limitations is amended by simply changing the period of limitation the amendment extends the time for asserting existing claims but does not revive barred claims.

We are committed to the rule that if before the bar of [fol. 96] a statute of limitations has become complete the statutory period of limitation is changed, the old law is not modified by a new so as to give to both statutes a proportional effect; but the time passed is effaced and the new law governs. In other words, the period provided by the new law runs upon all existing claims in order to constitute a bar. The statute in force at the time the action is brought controls, unless the time limited by the old statute for commencing an action has elapsed while the old statute was in force and before the suit is brought, in which case the suit is barred and no subsequent statute can renew the right or take away the bar. Wood on Limitations, 4th edition, Vol. 1, p. 59, §12; Packscher v. Fuller, 6 Wash. 534, 33 Pac. 875; Moore v. Brownfield, 7 Wash. 23, 34 Pac. 199; Seattle v. DeWolfe, 17 Wash. 349, 45 Pac. 553; Earle v. Froedtert Grain & Malting Co., 197 Wash. 341, 85 P. (2d) 264, and Peeples v. Hayes, 4 Wn. (2d) 253, 104 P.(2d) 305.

"A repeal of the statute of limitations by the legislature, and the enactment of a new statute, have the effect of renewing actions that have not expired before the new statute takes effect; but a statute of limitations which repeals or amends a former statute on the same subject does not revive an action which has been barred by the former statute. It is not retroactive, so as to remove the bar of limitations from a claim already barred at the time the act took effect." Wood on Limitations, 4th edition, Vol. 1, p. 74, §12b.

The question presented for our determination is whether the facts of the cases at bar fall within the five-year statute. True, in applying the statute, our decision depends upon the intent of the legislature—whether it intended to in-

clude or exclude claims barred by the three-year statute of limitations when the five year statute of limitations became effective.

The problem of distinguishing between ascertaining the legislative intent and applying the statute should not unduly confuse us. The first consists in discovering what the legislature meant. The second is the determination of [fol. 97] whether the facts of a given case are within or without the legislative meaning previously ascertained.

The meaning of the old Bolognian statute which provided that whoever drew blood in the streets should be severely punished was certainly clear upon its face. Could it apply to the case of a barber who opened a vein of a patient in the street?

"In 1 Blackstone's Commentaries, 91, the learned author, speaking of the construction of statutes, says: 'If there arise out of them any absurd consequences manifestly contradictory to common reason, they are, with regard to those collateral consequences, void * * * When some collateral matter arises out of the general words, and happens to be unreasonable, then the judges are, in decency, to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it,' and he gives as an illustration, if an Act of Parliament gives a man power to try all causes that arise within his Manor Dale, yet, if a cause should arise in which he himself is party, the Act is construed not to extend to that because it is unreasonable that any man should determine his own quarrel.

"There was a statute in Bologna that whoever drew blood in the streets should be severely punished, and yet it was held not to apply to the case of a barber who opened a vein in the street. It is commanded in the Decalogue that no work shall be done upon the Sabbath, and yet giving the command a rational interpretation founded upon its design the Infallible Judge held that it did not prohibit works of necessity, charity or benevolence on that day." Riggs v. Palmer, —— N. Y. ——, 5 L. R. A. 340.

The construction for which claimants contend is contrary to reason and could not be attributed to lawmakers in their right senses. That it must be presumed that the legislature

when it enacted the five-year limitation statute was aware of the rule that a legislative attempt to revive a statutory right once expired is unconstitutional needs no citation of sustaining authority. The imputation implicit in claimants' position is that our lawmakers were ignorant of the rule. What could be more unreasonable than to suppose that it was the legislative intention to knowingly pass an invalid act? No such purpose may be ascribed to the lawmakers.

The argument that plainly the legislature intended—and that it did not thereby exceed its powers—that the provi- [fol. 98] sions of the statute should apply retroactively so as to allow reopening of claims barred by limitation of time when referendum No. 22 (Laws of 1941, chapter 209) changed the limitation period in which to apply for a reopening of claims from three to five years is not sound. It is insisted that as the act is remedial only, and since it is a valid exercise of the police power it is not violative of the constitutional provisions relating to due process and the equal protection of the laws.

We are aware of the doctrine that as a general rule legislation which relates alone to procedure or to legal remedies will not be subject to the rule that statutes should not be given a retroactive operation. It should be borne in mind, however, that if a statute which relates to procedure or to legal remedy interferes with vested rights it will be subject to the general rule against retroactive operation. A cause of action once barred by a statute of limitations can not be revived or the right of defense to an action when once acquired can not be affected by a subsequent amendment or repeal of a statute, and the right to set up the bar of such a statute is a vested right which can not be taken away by legislation as it would be deprivation of property without due process of law. Crawford, Statutory Construction, § 285.

We can not too strongly stress that all rights of injured workmen under the workmen's compensation act, which is in derogation of the common law, are statutory. Rem. Rev. Stat., § 7673. If a statutory right has once expired the legislature can not revive that right. Danzer & Co. v. Gulf & Ship Island Railroad Co., 268 U. S. 633.

We find no respectable authority for the position that a time limitation prescribed in the statute upon the right created by the same statute is merely a matter of remedy

and not of substance. The three-year statute created a [fol. 99] right and prescribed a period of time in which to assert that right. Compliance with the limitation of time prescribed constituted a condition precedent to the enjoyment of the right. It is not material whether the limitation is considered as going to the claimants' right or to the claimants' remedy. The statutory right created expired upon failure to assert the same within the statutory period prescribed. Until the enactment of Laws of 1941, chapter 209, became effective the lapse of three years after the closing of a claim barred a subsequent application for reopening of the claim on the ground of aggravation of injury. Hunter v. Department of Labor and Industries, 190 Wash. 380, 68 P. (2d) 224.

In holding that statutes of limitation which relate merely to the remedy, do not give vested rights, and that the limitation provided for in the act simply defeats the remedy, the court said in Fannin County v. Renshaw, (Tex.), 29 S. W. (2d) 476, 478:

"There is an essential distinction between a statute simply limiting the remedy and a statute which not only bars the remedy but also extinguishes the right to the thing or property in question. In the one case the right is extinguished, while in the other the right still exists but the remedy therefor is taken away."

The author's observation in note to § 285, Crawford, Statutory Construction, that from a practical standpoint there is no real difference whether the right is extinguished or the remedy for the enforcement of the right is barred, is apt.

In Mattson v. Department of Labor and Industries, 176 Wash. 345, 29 P. (2d) 675, we held that an injured workman's rights under the workmen's compensation act being purely remedial, no vested rights were affected by Laws of 1927, chapter 310, which limited to three years the period in which the workman could apply for readjustment of compensation established or terminated prior to the enactment of said limitation despite the fact that Laws of 1923, [fol. 100] chapter 136, in which there was no time limitation within which to apply for readjustment was repealed by Laws of 1927, chapter 310.

True, the legislature, without violation of the guaranties of due process of law, may extend the period of limita-

tions and may make such extension applicable to causes of action which have already accrued. See 12 C. J. 1224. The legislature may also reduce the period and make such reduction applicable to existing causes of action subject, however, to the conditions that it may not entirely take away a right to sue nor so unreasonably shorten the period as practically to take away all remedy. We do not agree that a time limitation prescribed in the statute upon the right created by the same statute is merely a matter of remedy and not of substance. Nor do we agree that the legislature can remove a statutory bar to a cause of action that has already become complete.

In Mattson v. Department of Labor and Industries, *supra*, as in State ex rel Berwind Fuel Co. v. District Court, —— Minn. ——, 164 N. W. 812, it was unsuccessfully contended that, when an act fixed no limitation upon the time within which a workman could recover under the workmen's compensation act (during the life of which the workman sustained an injury), a subsequent act limiting the time to recover under the workmen's compensation act, did not apply to claims that accrued prior to the enactment of the second law.

In Davis & McMillan v. Industrial Accident Commission, —— Calif. ——, 246 Pac. 1046, 46 A. L. R. 1095, the supreme court of California held that the *legislature may extend* the *time for filing claims* under the workmen's compensation act *before* the *time fixed has expired* as there is no vested right in the running of the statute of limitations until it has completely run and barred the action.

[fol. 101] In Mattson v. Department of Labor and Industries, 176 Wash. 345, 29 P. (2d) 675, 293 U. S. 151, the United States Supreme Court held that the 1927 amendment of the compulsory workmen's compensation act of this state limiting the time to three years within which a claim could be reopened for the readjustment of compensation on account of aggravation of the disability did not deny due process of law to one who sustained compensable injuries while a preexisting statute was in effect though the preexisting statute contained no limitation as to the time within which such right might be asserted.

We find no comfort in Mattson v. Department of Labor and Industries, *supra*, for claimants. It is not authority for their contention that a legislative attempt to revive a

statutory right once expired is constitutional. See 16 C. J. S. 685.

In Decker v. Pouvailsmoth, 253 N. Y. 1, 168 N. E. 442, an infant under fifteen years of age was injured in the course of hazardous employment. Notice of injury was promptly given in his behalf but no claim for compensation was filed within a year after the accident, hence the right to claim compensation was barred in the absence of some exception thereto by the statute which provides that the right to claim compensation shall be barred unless within one year after the accident a claim for compensation shall be filed with the commissioner of the department of workmen's compensation. A guardian ad litem was appointed who instituted an action for the infant against the employer to recover damages under the provisions of a statute which it was claimed gave a right of action for breach of statutory duty in employing a child under sixteen years of age. A judgment recovered in the action was reversed on the ground that the workmen's compensation law provided an exclusive remedy. A year later, but nearly five years after the injury, the father of the infant presented a formal [fol. 102] claim for compensation in behalf of claimant. The only question presented was whether the claim was barred by the statute of limitations.

At the time of the accident the workmen's compensation statute provided that no limitation of time would run as against any person who was mentally incompetent or a minor dependent so long as he had no committee or guardian or next friend. The court held that the parent of the child as guardian of the person was the proper person to file the claim for compensation and that the bar of the statute prevailed when the parent neglected to file the claim for compensation within one year after the accident as provided by the statute.

In 1922 (this was after the statute of limitations had run against the claimant) the legislature materially amended (see New York Laws of 1922, chapter 615) and renumbered §116 of the workmen's compensation act. The new section (§115) reads:

"No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor so long as he has no committee or guardian."

In the court's opinion is the statement that the purpose of the legislature was clear and that all minors were brought within the protection of the statute; that "guardian" as used in the statute might reasonably be construed as meaning a guardian appointed by the court and charged with the duty of protecting the property interest of his ward.

"Such is the meaning of the word as used in Workmen's Compensation Law, §16, sub. 2, providing that the board may in its discretion require the appointment of a guardian for the purpose of receiving the compensation of a minor child."

The court further stated that such a statute might be made retroactive without impairing any constitutional rights of the employees but that the legislature had not indicated that the amended act should apply to cases where [fol. 103] the statute had already run, hence

"The court may not give a retroactive effect to a statute to revive claims already barred under the old section unless the legislative purpose is defined by express language or by necessary inference."

Laws of 1927, Chapter 709, of the laws of New York was enacted for the relief of claimant Decker and was intended to revive his claim. The statute authorized Decker to file a claim for compensation under the workmen's compensation law for injuries sustained in 1919 notwithstanding the failure to file his claim within the time prescribed by the workmen's compensation statute. The court held that the foregoing act for the relief of claimant Decker denied to the employer equal protection of the laws by singling out one of a class for special burdens and obligations and that one person should not be subjected to liability from which all others in like circumstances are exempted.

In Peeples v. Hayes, 4 Wn. (2d) 253, 104 P. (2d) 305, a debtor gave alleged preference in 1930 and again 1933. In 1937 a receiver was appointed who brought suit in 1938 in compliance with the statute which required that such suit must be instituted within six months from the date of the application for his appointment. The trial court held that the action was barred by statute of limitations prior to the date of the appointment of the receiver, who insisted that the statute (Rem. Rev. Stat., §5831-1) which provided for

suit to be commenced within six months after the application for appointment of receiver was exclusive and permitted the action.

We affirmed the judgment, agreeing with the trial court that while the statute under which the receiver was appointed created both the right and a bar to its enforcement yet that statute did not have the effect of reviving a cause of action which had already been barred by a statute of [fol. 104] limitations; that is, the statute did not create a new cause of action in the receiver but merely authorized him to assert any claim which was in existence at the time of his appointment.

By Laws of 1923, chapter 28, Remington 1927 (Sup.) §159, the legislature plainly expressed in the following language an intention to revive a claim barred by ordinary general statute of limitations:

"Limitation of Actions

"An Act relating to limitation of actions and the accrual thereof and applying to actions now barred as well as those not barred, and amending section 159 of Remington's Compiled Statutes * * *

"An action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation: Provided, however, The cause of action for such penalty or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitation, or the bar thereof, even though complete, * * * and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitation, or the bar thereof, even though complete, shall exist and be enforcible * * *"

In Herr v. Schwager, 145 Wash. 101, 258 Pac. 1039, cited by claimants in the cases at bar in support of their position, we held that the foregoing statute of limitations as to certain actions after the limitation had run operated on the remedy only and did not affect any vested right. We followed Campbell v. Holt, 115 U. S. 620 for the reason that the liability of defendants for diverting the assets of an insolvent corporation to the prejudice of the rights of a creditor of the corporation existed at the common law.

Danzer & Co. v. Gulf & Ship Island Railroad Co., 268 U. S. 633, is decisive of the question in the cases at bar and distinguishes Campbell v. Holt, 115 U. S. 620, which, like Herr v. Schwager, *supra*, involved a common law cause of action and ordinary statute of limitations.

In Campbell v. Holt, *supra*, the legislature of the state [fol. 105] of Texas repealed an ordinary statute of limitations under which the plaintiff's remedy at common law on contract had been barred. It was held by a divided United States Supreme Court that the removal of the bar and entry of judgment against defendants did not deprive them of their property without due process of law. There is no distinction in principle between Campbell v. Holt, *supra*, which has been repudiated by a majority of appellate courts, and Herr v. Schwager, *supra*.

In Danzer & Co. v. Gulf & Ship Island Railroad Co., *supra*, the interstate commerce act created a right against a railroad in favor of one who was damaged by the railroad's misrouting of a shipment. The act provided that all complaints for recovery of damages should be filed within two years from the time the cause of action accrued and not afterward. The United States supreme court held that the right of a shipper to an award of damages resulting from misrouting of his goods by a carrier was both created and limited by the interstate commerce act, therefore the lapse of time not only barred the remedy but also destroyed the liability of defendant to plaintiff. The right in that case, as in the cases at bar, was a statutory right which had expired therefore the legislative branch of government could not revive that right. The court said:

"We need not re-examine the doctrine of *Campbell* v. *Holt*, 115 U. S. 620, as it is plain that case does not apply. That was an action on a contract for the recovery of money. By a state statute of limitations, the right of action had been barred. The statute was repealed before the action was commenced. It was held that the action could be maintained and that such repeal did not deprive the debtor of his property without due process of law in violation of the Fourteenth Amendment. The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the statute of limitations related to the remedy only, and that

the removal of the bar was not unconstitutional. The opinion distinguishes the case from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a [fol. 106] cause of action created by the same or another provision, and operate as a limitation upon liability.

Herr v. Schwager, *supra*, and Campbell v. Holt, *supra*, upon which claimants rely, are not in point, hence it is not material to the cases at bar whether they are correctly decided.

In Bussey v. Bishop, 169 Ga. 251, 150 S. E. 78, 67 A. L. R. 287, in affirming a judgment which set aside an award in favor of claimant in a proceeding under the workmen's compensation statute the court held, under one of the provisions of the constitution of that state that no retroactive law shall be passed, that the legislature can not revive a right of action which was barred by the statute of limitations in existence prior to the passage of the reviving act. Particularly pertinent is the following language of the opinion:

"Most of the decisions which hold contrary to the ruling that the Legislature cannot revive a cause of action barred by the statute of limitations are based upon the ruling made in Campbell v. Holt, supra, in which a distinction was made between a statutory bar operating to invest persons with title to property, and a bar which constitutes merely a defense to a personal demand. Mr. Justice Miller, who delivered the opinion of the majority in that case gave the following reason for such distinction.

" 'We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we got beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution. We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case.'

"The reply to this contention by Mr. Justice Bradley, who dissented, and with whom Mr. Justice Harlan concurred, seems to be unanswerable. In his dissent Justice Bradley said:

" 'Now, an exemption from a demand, or an immunity from prosecution in a suit, is as valuable to the one party as the right to the demand or to prosecute the suit is to the other. The two things are correlative, and to say that the one is protected by constitutional guaranties and that the other is not seems to me almost an absurdity. One right is as valuable as the other. My property is as much imperiled by an action against me for money as it is by an action against me for my land or my goods. It may involve and sweep away all that I have in the world. Is not a right of defense to such an action of the greatest value to me? If it is not property in the sense of the Constitution, then we need another amendment to that instrument. But it seems to me that there can hardly be a doubt [fol. 107] that it is property. The immunity from suit which arises by operation of the statute of limitations is as valuable a right as the right to bring the suit itself. It is a right founded upon a wise and just policy. Statutes of limitation are not only calculated for the repose and peace of society, but to provide against the evils that arise from loss of evidence and the failing memory of witnesses. It is true that a man may plead the statute when he justly owes the debt for which he is sued; and this has led the courts to adopt strict rules of pleading and proof to be observed when the defense of the statutes is interposed. But it is, nevertheless, a right given by a just and politic law, and, when vested, is as much to be protected as any other right that a man has. The fact that this defense pertains to the remedy does not alter the case. Remedies are the life of rights and are equally protected by the Constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away. This court has frequently held that to deprive a man of a remedy for enforcing a contract is itself a mode of impairing the validity of the contract. And, as before said, the right of defense is just as valuable as the right of action. It is the defendant's remedy. There

is really no difference between the one right and the other in this respect.'

"We can see no valid reason why a claim which is barred by the statute of limitations can be revived and restored by an act of the Legislature in the same jurisdiction. This is especially true, as we have shown, where the statute creating the claim distinctly provides that the claim shall be forever barred, if not filed with a given tribunal within the period of limitation named in the statute. The requirement that the claim for compensation shall be filed with the Industrial Commission within one year after the accident is an essential ingredient, and the right ceases and terminates where no action is so commenced at the expiration of that time. Where a statute gives a new right of action not existing at common law and prescribed the time within which it may be enforced, the time so prescribed is a condition to its enforcement, an element in the right itself, and the right fails with the failure to apply for relief within the allotted time."

See Krause v. Rarity, —— Cal. ——, 293 Pac. 62, 77 A. L. R. 1327, and Annotations 36 A. L. R. 1316, et seq., on the question of the power of legislature to revive a right of action barred by limitation. See 34 Am. Jur. pp. 33-39, §§ 27-35, on the subjects of modification or repeal of statute of limitation, enlarging of statutory period, suspension of operation of statute, retrospective statutes, and power of legislature to revive an action which has become barred by statute of limitation.

Claimants insist that as the statute in question is an exercise of the police power of the state it is not violative of constitutional provisions relating to due process and [fol. 108] the equal protection of the laws. If an enactment is a valid exercise of the police power it, as stated in Sutherland, Statutory Construction, 3rd edition, vol. 2 § 2203, "does not lack due process, nor are contractural obligations violated."

While the police power is an attribute of sovereignty which exists without express declaration, a limitation upon it is that it must not violate any direct or positive mandate of the constitution. She v. Olson, 185 Wash. 143, 186 Wash. 700, 53 P. (2d) 615, 59 P. (2d) 1183, 111 A. L. R. 998.

The police power is not a universal solvent by which all constitutional guaranties and limitations can be loosened and set aside, regardless of their clear and plain meaning, nor is it a substitute for those guaranties. The exercise of the police power is limited in that it may not unreasonably limit rights guaranteed by the federal and state constitutions. The constitutional guaranty of the right of property protects it from unjustifiable impairment or abridgment by legislative edicts.

"While it is difficult, if not impossible, to define precisely the limits of the police power, there must in the very nature of things be some limit to it; for otherwise the guaranties of written constitutions would be little more than mere precatory and directory suggestions without force or life, affording to the citizen only a false and illusory protection against the invasion of his rights by the state, and his security would depend not upon constitutional guaranties, but upon the will of the state in exercising an unlimited police power." Goldman v. Crowther, 147 Md. 282, 128 Atl. 50, 38 A. L. R. 1455.

The workmen's compensation act, as stated above, is in derogation of the common law and all rights of injured workmen thereunder are statutory. Rem. Rev. Stat. §7673. The amount allowed under the act upon a claim is charged to the employer's cost experience as provided by the statute and the claim is ultimately paid, to a large extent, by such employer through those resultant increased premiums. Rem. Rev. Stat., §7676; Mud Bay Logging Co. v. Department of Labor and Industries, 189 Wash. 285, 64 [fol. 109] P. (2d) 1054, 193 Wash. 275, 75 P. (2d) 579. See, also, St. Paul & Tacoma Lumber Co. v. Department of Labor and Industries, 119 Wash. Dec. 682, —— P. (2d) ——.

State v. Vinther, 176 Wash. 391, 29 P. (2d) 693, State ex rel. Davis-Smith Company v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, and Mountain Timber Company v. Washington, 75 Wash. 581, 135 Pac. 465, 243 U. S. 237, are cited in support of the argument that the fund out of which the claims of workmen are paid are license taxes exacted of employers for the privilege of engaging in industries, therefore the legislature may, and it has, constitutionally removed the bar of the three-year statute of limitations by enactment of the five-year statute.

All that we held in State v. Vinther, *supra*, was that the state in suing for the benefit of the accident fund, under one of the provisions of the workmen's compensation act, on an assigned claim for the death of a workman acted in its sovereign capacity and not for the benefit of private individuals, therefore the statute of limitations could not run against the sovereign state. It is true that in the course of our opinion we indulged in gratuitous observations concerning the character of the accident fund but that language was not necessary to our decision and should not have appeared in the opinion. The same criticism may be justly leveled at our opinions in State ex rel. Davis-Smith Company v. Clausen, *supra*, and Mountain Timber Company v. Washington, *supra*. A careful examination of the three cases cited will convince an understanding reader that the basis of the decision in each of the three cases was not that stated by claimants in the cases at bar.

The contributions paid by the various employers into the accident fund are not license taxes exacted of employers for the mere privilege of engaging in business. The con- [fol. 110] tributing employers have such a vested right or interest in the fund created by their contributions as to entitle them to an appeal to the courts from the department's award to a claimant. The employer has such a material interest in that fund that reviewing courts, although appealing employer may not supersede the department's award, will suspend the operation of the department's order making the award pending disposition of that appeal from the order to the superior court and from the judgment of the superior court to this court. See Mud Bay Logging Co. v. Department of Labor and Industries, *supra*, in which we held in a seven to two *en banc* decision that the contributions paid by the various employers into the accident fund were not taxes exacted from employers for the privilege of engaging in business. In State ex rel. Crabb v. Olinger, 196 Wash. 308, 82 P. (2d) 865, we refused to recede from that position and in St. Paul & Tacoma Lumber Co. v. Department of Labor and Industries, 119 Wash. Dec. 682, — P. (2d) —, we again stressed our prior holdings that an employer contributing to the accident fund has a material interest in that fund, a vested right therein of which he may not be deprived without due process of law.

In Danzer & Co. v. Gulf & Ship Island Railroad Co., *supra*, the United States Supreme Court held that a legislative attempt to revive a statutory right, such as is in-

volved in the cases at bar, once expired is unconstitutional. There is no respectable authority contrary to that decision.

The warning voiced in dissenting opinion of the late Chief Justice Chadwick in Kuehl v. Edmonds, 91 Wash. 185, 157 Pac. 850, is as challenging and the language employed as apt in these parlous days as when uttered in 1916. In pleading for stability, a government of laws and not of men, that great jurist said:

[fol. 111] "It (the majority opinion) will encourage those who, in these times of shifting sentiment, say that some courts never make a precedent and never follow one."

The question presented is whether a cause of action (logically, there is no difference whether the right is extinguished or the remedy for the enforcement of the right is barred) once barred by a statute of limitations can be revived or the right of defense to an action when once acquired can be affected by a subsequent amendment or repeal of the limitation statute.

I am still of the view that the right to set up the bar of such a statute is a vested right which can not be taken away by legislation as it would be deprivation of property without due process of law. The majority opinion invades the right of the employer to whom this court has given the right of appeal in this class of cases. Only by reason of his interest in the fund may the employer be granted the right of appeal.

There is no respectable authority contrary to Danzer & Company v. Gulf & Ship Island Railroad Co., *supra*, in which the United States Supreme Court held that a legislative attempt to revive a statutory right, such as is involved in the case at bar, once expired, is unconstitutional.

The *raison d'etre* for the present indefensible position of the majority may be, as argued by one of the members of this court, "The human element," (change of judicial personnel) and probably the desire of that new personnel to favor, "in view of the social aspects (the Lorelei to which we have too long listened and which is luring the Ship of State on to the reefs) of the entire legislation," one class over another. To that program of inequality and legal instability I can not subscribe.

The judgments in the Lane and Rowley cases should be [fol. 112] affirmed. The judgment in the Moore case should be reversed.

Millard, J.

[fol. 113] IN SUPREME COURT OF WASHINGTON

No. 29541. En Banc

GANGE LUMBER COMPANY, a Corporation, Plaintiff and Appellant,

v.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendants and Respondents.

OPINION—Filed January 27th, 1945

As stated in appellant's brief, this is the second time this cause has been before this court. The action as originally commenced before the Department of Labor and Industries, was entitled Ralph Rowley, plaintiff, v. Department of Labor and Industries, defendant, Gange Lumber Company, employer.

The above proceeding was commenced by filing with the department on or about July 30, 1937, a report of accident by Ralph Rowley, claimant, and Gange Lumber Company, employer. The original claim was closed March 1, 1938. On March 13, 1943, Mr. Rowley made an application to reopen his claim. On March 24, 1943, the department, without passing on the merits of the application, entered an order to the effect that it was without authority to take further action on the claim, as more than three years had expired since the original claim was closed. Mr. Rowley then appealed to the joint board for review of the order of March 24, 1943, made by the supervisor, contending that under Rem. Supp. 1941, § 7679 (h), he had five years from the effective date of the act last mentioned, to apply for readjustment of his original claim on the ground of aggravation.

On April 5, 1943, the joint board entered an order affirming the action of the department. On April 19, 1943, Mr. [fol. 114] Rowley appealed from the order of the joint board to the superior court of Pierce county. On October 27, 1943, the employer, Gange Lumber Company, filed in superior court a motion to dismiss the cause and appeal on the following grounds: (1) That the order of the joint board dated April 5, 1943, affirming the order of the supervisor dated March 24, 1943, denying the plaintiff's (Mr. Row-

ley's) application to reopen his claim on the ground that said application and the reopening of said claim were barred by the provisions of Rem. Rev. Stat., § 7679 (h), being Laws of 1911, chapter 74, § 5 (h), as amended by Laws of 1927, chapter 310, § 4, is in accordance with law. (2) That under the provisions of Rem. Rev. Stat., § 7679 (h), plaintiff's right, if any, to reopening of his claim and additional compensation, on the alleged ground that his disability became aggravated after his claim was closed on March 1, 1938, expired by lapse of time prior to March 19, 1943, the date he filed his application for reopening, and said order of the joint board is therefore in accordance with law. (3) That said order of the joint board, rejecting plaintiff's contention that he was authorized by Laws of 1941, chapter 209, §1, referred by petition to the people and adopted by them as referendum No. 22 on November 3, 1942, which became effective on December 3, 1942, to apply for a reopening of his claim for aggravation as aforesaid, is in accordance with law. (4) That if Laws of 1941, chapter 209, § 1, adopted by the people as aforesaid, is construed as urged by plaintiff, such law is in violation of Art. I, § 3, and Art. I, § 23, of the constitution of the state of Washington, and is void. (5) That if said Laws of 1941, chapter 209, § 1, adopted by the people as aforesaid, is construed as urged by plaintiff, said law is in violation of Art. I, § 10, clause 1 of the constitution of the [fol. 115] United States of America, and of the fourteenth amendment to the constitution of the United States of America, and is void.

On December 10, 1943, the superior court for Pierce county made and entered an order dismissing Rowley's appeal, and affirming the order of the department closing Rowley's claim. From the order dismissing the appeal, Rowley duly appealed to this court. On appeal to this court, the Rowley case was consolidated with I. C. Lane v. Department of Labor and Industries, No. 29288 of this court, I. C. Lane v. Department of Labor and Industries, No. 29289, and John Moore v. Department of Labor and Industries, No. 29291, and the above appeals will be referred to as Lane v. Department of Labor and Industries, reported in 121 Wash. Dec., 395, 151 P. (2d) 440. In order that it may be understood what questions were before the court, and de-

cided by it on the appeals last above referred to, we quote from the opinion:

"This appeal involves the claims of injured workman for compensation for aggravation of injuries and for which they had previously received awards. In the two cases of I. C. Lane and in that of Ralph Rowley, the court affirmed the orders of the department of labor and industries disallowing the claims on the ground that they had not been made within the time limited by law. In the case of John Moore, the court reversed the order of the department disallowing his claim upon the same ground. On appeal to this court, the cases were consolidated. The parties to the appeal will be referred to as the claimants, the employers, and the department.

"*The questions to be determined are whether the act of 1941 applies to barred claims, and, if so, is it constitutional.*" (Italics ours.)

The opinion concludes as follows:

"The act of 1941 before us is so plain and all-inclusive in its wording as not to need construction. It applies to all applicants for readjustment whose compensation has been established or terminated, and in passing it the legislative authority has encountered no constitutional inhibitions.

"The judgments in the Lane and the Rowley cases are reversed, and the judgment in the Moore case is affirmed."

The remittitur from the court went down, and was filed in the superior court for Pierce county on October 17, 1944. Thereafter and on October 19, 1944, said court entered [fol. 116] judgment on the remittitur in the case of Ralph Rowley v. Department of Labor and Industries, and Gange Lumber Company, employer. Said judgment vacated the former judgment entered by the Superior Court, and reversed the order of the joint board, and remanded the cause to the department to consider upon its merits, after the introduction of evidence at an appropriate hearing.

On November 25, 1944, the department reopened the claim, and entered an order allowing additional compensation to Mr. Rowley. The employer, Gange Lumber Company, filed its application for rehearing before the joint board, and on November 27, 1944, the joint board, after a

hearing, entered an order denying the employer's application for a rehearing, stating as its reason therefor, in part as follows:

"It Is Hereby Ordered, That whereas it appears to the board that this claim has heretofore been appealed to the supreme court of the state of Washington and that said court held upon said appeal, in *Lane v. Department of Labor and Industries*, 121 Wash. Dec. (No. 11) 395, that the claimant herein was entitled to a consideration of his application for reopening on its merits under Laws of Washington, 1941, Chapter 209, Section 1, and that said law was not in violation of the 14th Amendment to the constitution of the United States as contended by the employer herein, and the joint board being advised in the premises, and you being hereby notified, now:

"It Is Hereby Ordered that the application of the employer, Gange Lumber Company for a rehearing of the order of the supervisor of Industrial insurance dated November 25, 1944, be and the same is hereby denied."

The employer, Gange Lumber Company, duly appealed from the order of the joint board, to the superior court of Pierce county, and on December 5, 1944, filed in the superior court its motion for judgment on the record, and on the same date Ralph Rowley and the department of labor and industries filed motions for judgment of dismissal of the appeal of the Gange Lumber Company.

On December 5, 1944, the superior court entered an order granting the motions of Ralph Rowley and the department, and entered a judgment of dismissal. This judgment recited in part:

[fol. 117] "• • • and it appearing to the court that no issue of fact has been or is raised herein and that the only issue of law herein is whether Laws of Washington, 1941, chapter 208, § 1, insofar as it permits the reopening of the industrial insurance claim of the defendant Ralph Rowley and the award made to said defendant upon such reopening by the order herein of the Supervisor of Industrial Insurance dated November 25, 1944, and the charging of the amount of said award to the cost experience of the plaintiff Gange Lumber Company under the workmens' compensation act of the state of Washington, constitutes a taking of the property of the plaintiff Gange Lumber Com-

pany without due process of law and denies said plaintiff the equal protection of the laws in violation of the 14th amendment to the constitution of the United States; and

"It appearing further to the court that this cause has heretofore been before the court in its cause No. 89046 wherein judgment was entered on December 10, 1943, from which judgment the defendant Ralph Rowley appealed to the supreme court of Washington; that said appeal was consolidated with three other causes upon appeal before said court and was decided in *Lane v. Department of Labor and Industries*, 121 Wash. Dec. (No. 11) 395; that the aforesaid issue of law was raised between the parties hereto in said appeal and was decided therein by said supreme court adversely to the present contention of the plaintiff herein; and

"The court being of the opinion that said decision of the supreme court of Washington is a determination of the aforesaid issue of law which is conclusive upon this court in favor of the defendants and against the plaintiff, and the court being advised in the premises,

"It Is Therefore Ordered, Adjudged and Decreed, that the aforesaid motion of the plaintiff for judgment upon the record be, and the same is hereby denied and that the motions of the defendants Ralph Rowley and Department of Labor and Industries of the state of Washington be, and each thereof is hereby granted to all of which the plaintiff excepts and its exception is allowed; and

"It Is Further Ordered, Adjudged and Decreed, that this cause and the plaintiff's appeal herein be, and the same are hereby dismissed with prejudice; that the aforesaid order of the joint board dated November 27, 1944, be, and the same is hereby confirmed."

From the above judgment, the Gange Lumber Company has appealed to this court. Appellant states in its brief that the questions to be determined on this appeal are:

"1. Did Laws of Washington chapter 209, § 1, amending the workmens' compensation act by changing the period for applying to reopen a claim under said act from three to five years, operate to permit reopening of respondent Rowley's claim notwithstanding that his right to apply for such reopening had become barred under the amended law?"

Following the above question in appellant's brief, it states: "Affirmed by the superior court upon the authority of Lane et al. v. Department of Labor and Industries, 121 Wash. Dec. (No. 11) 395."

[fol. 118] The questions continue as follows:

"2. Is said Chapter 209, if it applies as interpreted by the superior court, in violation of the fourteenth amendment to the constitution of the United States and of Article 1, § 3 of the constitution of the state of Washington?"

Following this question in appellant's brief, it states: "Negatived by the superior court upon authority of Lane et al v. Department of Labor and Industries, *supra.*"

As hereinbefore set out and shown by the record, both of the above questions of law were before this court in Lane et al. v. Department of Labor and Industries, *supra*, and specifically decided therein contrary to the contention of the Gange Lumber Company as there made, and contrary to its contentions on this appeal. As this appeal involves the same parties, the same subject matter, and the same questions of law as were involved in the Lane case, *supra*, the decision in that case on the legal questions here raised, became the law of this case, and therefore when this cause came before the superior court it was bound by the law of the case as decided on the former appeal, and as no issue of fact was involved, but only the same issues of law as on the former appeal, the trial court had no alternative other than to dismiss this action. Camas v. Kiggins, 120 Wash. 40, 206 Pac. 951; Morehouse v. Everett, 121 Wash. 399, 252 Pac., 157; Epley v. Hunter, 157 Wash. 333, 289 Pac. 27.

In the case last cited, we quoted from 2 R. C. L. p. 223, § 187, as follows:

"It may be stated generally that a court of review is precluded from agitating questions which were propounded, considered, and decided on a previous review; the decisions agree that, as a general rule, when an appellate court passes upon a question and remands the cause for further proceedings, the question there settled becomes the 'law of the case' upon a subsequent appeal; the only mode for re-

viewing the decision on the prior appeal being by a motion for a rehearing."

[fol. 119] No question of fact having been raised on this appeal, the only issues of law raised herein having been decided adversely to appellant's contention on the former appeal, it follows that the trial court correctly dismissed this action, as the trial court was bound by the law of the case as established by this court on the former appeal.

For the reasons herein assigned, the judgment of the trial court is affirmed.

Jeffers, J.

We concur: Beals, C. J.; Steinert, J.; Blake, J.; Robinson, J.; Mallery, J.; Grady, J.

CONCURRING OPINION

I concur solely on the ground that our opinion or decision in Lane v. Dept. of Labor, *supra*, is the law of the case at bar. I am still of the view that this court grossly erred in its opinion in the Lane case. The constitutional question appellant seeks to raise may be presented in another case in which a different party than in Lane case brings the question here.

Millard, J.

I concur: Simpson, J.

[File endorsement omitted.]

[fol. 119a] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

No. 29541

PETITION FOR APPEAL AND WRIT OF SUPERSEDEAS—Filed February 28, 1945

To the Honorable Walter B. Beals, Chief Justice of the Supreme Court of the State of Washington:

Your petitioner, Gange Lumber Company, a corporation, respectfully shows:

Your petitioner is the appellant in the above entitled cause in which a final judgment was entered by the Supreme Court of the State of Washington on February 19, 1945.

The appellee, Ralph Rowley, having been injured in extra-hazardous employment within the State of Washington on July 13, 1937 while in the employ of your petitioner, filed his claim with the appellee Department of Labor and Industries of the State of Washington for compensation under the Workmen's Compensation Act of said State. Said claim was allowed, compensation was paid thereon for the permanent partial disability suffered by the appellee Rowley as a consequence of his said injury and the claim was closed by final order of the appellee Department of Labor and Industries of the State of Washington dated March 9, 1938, from which order no appeal was taken.

From the year 1927 until December 3, 1942, the said Workmen's Compensation Act provided that an application to reopen a claim and for additional compensation on ac-[fol. 119b] count of aggravation of disability occurring after closure of the claim might be filed with the appellee Department of Labor and Industries at any time within three years after such closure, but not thereafter. On December 3, 1942 there became effective an Act changing the said limitation period from three years to five years, being Laws of Washington, 1941, Chapter 209, Section 1, page 633 (Remington's Revised Statutes of the State of Washington, 1941 Supplement, Section 7679 (h), page 310). Subsequent to December 3, 1942, that is, on March 19, 1943, the appellee Ralph Rowley, although he had failed to apply for reopening of his claim within three years after the date of closure thereof, filed his application with the appellee Department of Labor and Industries for reopening of his claim and for additional compensation on account of an alleged aggravation of his disability, contending that said amendatory statute operated retroactively to permit reopening of a claim notwithstanding that the right to apply for reopening thereof had become barred under the earlier law. Said application was rejected by order of the appellee Department of Labor and Industries on the ground that it was barred by limitation of time, from which order the appellee Ralph Rowley appealed to the Superior Court of the State of Washington for Pierce County. The appellee Department of Labor and Industries appeared in said Court upon said appeal and, as provided by the laws of said State, your petitioner, Gange Lumber Company, appeared upon said appeal and filed its motion for dismissal thereof on the ground, among others, that said Laws of Washington, 1941,

Chapter 209, Section 1, if construed as urged by the appellee Ralph Rowley, was in violation of the Fourteenth Amendment to the Constitution of the United States of America in its application to your petitioner.

The said Superior Court for Pierce County granted your petitioner's said motion and entered judgment dismissing [fol. 119c] said appeal to said court, from which judgment the appellee Ralph Rowley appealed to the Supreme Court of the State of Washington where the cause was consolidated for consideration and decision with three other causes in said Court involving the same issues.

On August 30, 1944, the Supreme Court of the State of Washington filed its opinion and decision in said consolidated causes, holding that said Laws of Washington, 1941, Chapter 209, Section 1, by reviving claims barred under the earlier law, was not in violation of the Fourteenth Amendment to the Constitution of the United States as urged by your petitioner and directing entry of judgment reversing the aforesaid judgment of the Superior Court.

Within due time your petitioner filed its petition for rehearing of said decision. Said petition was denied on October 4, 1944, and judgment was entered in said consolidated causes by the Supreme Court of the State of Washington in accordance with its said opinion and decision. Pursuant to the remittitur of said Supreme Court, a judgment was entered on October 19, 1944 by said Superior Court, reversing the aforesaid order of the appellee Department of Labor and Industries and directing that the appellee Ralph Rowley's application for reopening of his claim and for additional compensation be considered upon its merits by said appellee Department of Labor and Industries. Said application was thereafter so considered and, upon a finding by said Department that the disability of said Rowley had become aggravated after his claim was originally closed, further compensation was allowed to him by order of said Department dated November 27, 1944, from which order your petitioner duly appealed to said Superior Court for Pierce County. Thereafter, on December 5, 1944, a final judgment was entered by said Superior Court dismissing your petitioner's appeal to said Court with prejudice, [fol. 119d] from which judgment your petitioner duly appealed to the Supreme Court of the State of Washington which Court, by its opinion and decision filed on January

27, 1945, directed entry of judgment affirming said judgment of the Superior Court for Pierce County.

Within due time your petitioner filed its petition for rehearing of said decision of the Supreme Court of the State of Washington. Said petition was denied on February 16, 1945, and on February 19, 1945, a final judgment was entered by the said Supreme Court affirming the aforesaid judgment dated December 5, 1944 of the Superior Court for Pierce County.

The said Supreme Court of the State of Washington is the highest court of said State in which a decision in said suit can be had. In said suit there is drawn in question the validity of a statute of the State of Washington on the ground that said statute, in its application to your petitioner, is repugnant to, and in violation of the Fourteenth Amendment to the Constitution of the United States of America, and the decision of the highest Court of the State of Washington is in favor of its validity, notwithstanding your petitioner's contention that said statute violates the Fourteenth Amendment to the Constitution of the United States.

Therefore in accordance with Section 237a of the Judicial Code (28 U. S. C. A., Section 344), and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows that this case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit, under Section 237a of the Judicial Code (28 U. S. C. A., Section 344), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right. The errors upon which your petitioner claims to be entitled to an appeal are more fully set forth in the assignment of er- [fol. 119e] rors filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the Supreme Court of the State of Washington, the highest Court of said State in which a decision in this case can be had, to the Supreme Court of the United States in order that the aforesaid decision and final judg-

ment of said Supreme Court of the State of Washington may be examined and reversed, and also prays that a supersedeas and stay of execution of said final judgment pending such appeal be granted and prays also that a transcript of the records, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Washington under his hand and the seal of said Court, may be sent to the Supreme Court of the United States as provided by law, and that an order be made adjudging the security to be required of the petitioner and that the supersedeas and cost bond tendered by the petitioner be approved.

Dated this 28th day of February, 1945.

John Ambler, T. J. Hanify, Attorneys for Appellant and Petitioner, Gange Lumber Company.

Service of the foregoing Petition for Appeal and Writ of Supersedeas this 28th day of February, 1945 is hereby acknowledged. Jay C. Allen, Charles R. Carey, Attorneys for Appellee Ralph Rowley. Smith Troy, Attorney General of the State of Washington; R. A. Moen, Assistant Attorney General of the State of Washington, Attorneys for Appellee Department of Labor and Industries of the State of Washington.

[File endorsement omitted.]

[fol. 119f] IN THE SUPREME COURT OF THE UNITED STATES

No. 29541

[Title omitted]

ASSIGNMENT OF ERROR—Filed February 28, 1945

The appellant assigns the following errors in the records and proceedings in this cause:

1. The Supreme Court of the State of Washington by its judgment erred in holding that Laws of Washington, 1941, Chapter 209, Section 1, insofar as said statute revives appellee's right to apply for reopening of his industrial insurance claim, notwithstanding that said right had become barred and had expired prior to the effective

date of said statute, does not deprive appellant of its property without due process of law or deny appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America, and said Court erred in failing to hold that said statute does so deprive appellant of its property and does so deny it the equal protection of the laws.

2. The Supreme Court of the State of Washington by its judgment erred in holding that the removal by said Laws of Washington, 1941, Chapter 209, Section 1, of the bar of limitations to the reopening of Appellee Rowley's said claim affected only said appellee's remedies under the Workmen's Compensation Act of said State and did not [fol. 119-g] affect the substantial rights of appellant, and said Court erred in failing to hold that said removal did affect appellant's substantial rights.

3. The Supreme Court of the State of Washington by its judgment erred in holding that a statute, purportedly enacted in the exercise of a state's police power, viz., Laws of Washington, 1941, Chapter 209, is not subject or subservient to the Fourteenth Amendment to the Constitution of the United States of America.

4. The Supreme Court of the State of Washington by its judgment erred in holding that the contributions or premiums exacted of an employer by the Workmen's Compensation Act of the State of Washington and paid by the employer into the accident fund maintained by the appellee Department of Labor and Industries of said State are a license or excise tax.

5. The Supreme Court of the State of Washington by its judgment erred in affirming the judgment of the Superior Court of the State of Washington for Pierce County, dismissing appellant's appeal from the order of the appellee Department of Labor and Industries of said State allowing additional compensation to the appellee Rowley under said Laws of Washington, 1941, Chapter 209.

6. The Supreme Court of the State of Washington by its judgment erred in failing to reverse said judgment of the Superior Court for Pierce County and in failing to render judgment dismissing the appellee Rowley's appli-

cation for reopening of his claim and for additional compensation.

Wherefore, on account of the errors hereinabove assigned, appellant prays that the judgment of the Supreme Court of the State of Washington, dated the *19th* day of February, 1945, in the above entitled cause be reversed and that judgment be rendered in favor of this appellant.

Dated this 28th day of February, 1945.

John Ambler, T. J. Hanify, Attorneys for Appellant Gange Lumber Company — — —.

Service of the foregoing on this 28th day of February, 1945 is hereby acknowledged. Jay C. Allen, Charles R. Carey, Attorneys for Appellee Ralph Rowley. Smith Troy, Attorney General of the State of Washington; R. A. Moen, Assistant Attorney General of the State of Washington, Attorneys for Appellee Department of Labor and Industries of the State of Washington.

[File endorsement omitted.]

[fols. 120-121] Bond on Appeal for $2,000.00 Approved and filed February 28, 1945 omitted in printing.

[fols. 122-125] IN SUPREME COURT OF THE UNITED STATES

No. 29541

[Title omitted]

ORDER ALLOWING APPEAL AND WRIT OF SUPERSEDEAS—Filed February 28, 1945

The petition of Gange Lumber Company, a corporation, the appellant in the above entitled cause, for an order allowing an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Washington and for a supersedeas and stay of execution of said judgment pending such appeal having been filed with the Clerk of this Court and presented herein, accompanied by an Assign-

ment of Errors and Statement as to Jurisdiction, all as provided by Rules 9, 12 and 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States of America from the final judgment, dated the 19th day of February, 1945, of the Supreme Court of the State of Washington, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Washington shall, within sixty (60) days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said court, a true copy of the material parts of the record herein which shall be designated by praecipe or stipulation of the parties or their counsel herein, all in [fol. 126] accordance with Rule 10 of the Rules of the Supreme Court of the United States; and it is further

Ordered that a supersedeas and stay of execution of said final judgment pending such appeal be and is hereby granted upon filing of the bond hereinafter ordered; and it is further

Ordered that said appellant shall give a good and sufficient supersedeas and cost bond in the sum of Two thousand ($2000.00) Dollars, conditioned that said appellant shall prosecute said appeal to effect and answer all damages and costs if it fails to make its plea good.

Dated this 28th day of February, 1945.

Walter B. Beals, Chief Justice of the Supreme Court of the State of Washington.

Service of the foregoing Order Allowing Appeal and Writ of Supersedeas this 28th day of February, 1945 is hereby acknowledged.

Jay C. Allen, Charles R. Carey, Attorneys for Appellee Ralph Rowley. Smith Troy, Attorney General of the State of Washington. R. A. Moen, Assistant Attorney General of the State of Washington. Attorneys for appellee Department of Labor and Industries of the State of Washington.

[File endorsement omitted.]

[fols. 127-128] Citation in usual form showing service on Jay E. Allen et al., filed February 28, 1945, omitted in printing.

[fol. 129] IN SUPREME COURT OF THE UNITED STATES

No. 29541

[Title omitted]

STIPULATION FOR TRANSCRIPT OF RECORD—Filed February 28, 1945

It Is Hereby Stipulated Between Gange Lumber Company, a corporation, appellant above named, and Ralph Rowley, appellee above named, and Department of Labor and Industries of the State of Washington, appellee above named, by and through their respective counsel, as follows:

That the Clerk of the Supreme Court of the State of Washington is hereby instructed to prepare the record on appeal in the above entitled cause, and that the following papers shall be included in, and shall constitute said record on appeal:

1. Accident Report and Claim for Compensation to the Department of Labor and Industries;

2. Order of Supervisor of Industrial Insurance dated January 25, 1938;

3. Order of Supervisor of Industrial Insurance dated March 9, 1938;

4. Application to Reopen claim filed March 19, 1943;

5. Order of Supervisor of Industrial Insurance dated March 24, 1943;

6. Application to Joint Board of Department of Labor and Industries for Rehearing dated March 26, 1943;

7. Order of Joint Board dated April 5, 1943;

8. Notice of Appeal to Superior Court for Pierce County dated April 19, 1943;

9. Employers' motion to Dismiss Appeal to Superior Court;

[fol. 130] 10. Order of Superior Court Granting Employers' Motion to Dismiss and Judgment of Dismissal dated December 10, 1943;

10a. Notice of Appeal to Supreme Court, January 7, 1944;

11. Appellant's Brief on Appeal (No. 29290):
Title page;
Page 12, lines 1 through 9;
Page 53, lines 1 and 2;
Page 60, lines 1, 2 and 3;
Page 61, lines 8 through 12;
Page 62, line 13, through page 64, line 20;
Page 67, lines 7 through 12;
Page 75, lines 13 through 21.

12. Appellant's Petition for Rehearing (No. 29290):
Title page;
Page 13, lines 6 through 16;
Page 14, line 19, through page 15, line 11;
Page 19, line 11, through line 7;
Page 20, lines 14 through 18;

13. Order, dated October 4, 1944, of Supreme Court of Washington Denying Petition for Rehearing;

14. Judgment of Supreme Court of Washington dated October 9, 1944;

15. Judgment of Superior Court, dated October 19, 1944, on Remittitur of Supreme Court;

16. Order of Joint Board dated October 30, 1944;

17. Report of Physician dated October 28, 1944;

18. Order of Supervisor of Industrial Insurance dated November 25, 1944;

19. Appellant's Petition to Joint Board for Rehearing;

20. Joint Board's Order dated November 27, 1944;

21. Appellant's Notice of Appeal to Superior Court;

22. Appellant's Motion in Superior Court for Judgment on Record;

23. Defendants' motion for Judgment of Dismissal of Appeal to Superior Court;

24. Judgment of Superior Court dated December 5, 1944;

25. Appellant's Notice of Appeal to Supreme Court of State of Washington;

26. Appellant's Assignments of Error (Appellant's Brief, No. 29541, title page, omitting names of counsel, and page 2, line 11, through page 5, line 20);

[fol. 131] 27. Appellant's Petition to Supreme Court of Washington for Rehearing:
Title page, omitting names of counsel;
Page 4, line 17 through page 5, line 10;

28. Order of Supreme Court of Washington denying Petition for Rehearing;
29. Judgment of Supreme Court of Washington dated February 19, 1945;
30. Petition for Appeal to Supreme Court of United States;
31. Assignments of Error;
32. Statement as to Jurisdiction;
33. Bond on Appeal;
34. Statement Directing Attention to Provisions of Paragraph 3 of Rule 12 of Rules of United States Supreme Court;
35. Proof of Service of Papers Required by United States Supreme Court Rule 12;
36. Order Allowing Appeal and Writ of Supersedeas;
37. Citation;
38. Stipulation for Transcript of Record;
39. Clerk's Certificate.

Dated this 28th day of February, 1945.

John Ambler, T. J. Hanify, Attorneys for Appellant. Jay C. Allen, Charles R. Carey, Attorneys for Appellee Ralph Rowley. Smith Troy, Attorney General of the State of Washington, R. A. Moen, Assistant Attorney General of the State of Washington, Attorneys for Appellee, Department of Labor and Industries of the State of Washington.

[File endorsement omitted.]

[fol. 132] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 133] IN THE SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed March 23, 1945

Comes now the Appellant and adopts its Assignments of Error as its statement of the points to be relied upon, and represents that the whole of the record as filed is necessary for the consideration of the case, except that the

Clerk is requested to omit the following portions when printing the record herein:

1. Omit the long paragraph on page 27 beginning with the words "This claim was allowed";
2. Omit lines 24 to 31, inclusive, on page 39;
3. Omit all of page 40;
4. Omit all of page 41;
5. Omit all of page 42;
6. Omit lines 1 to 19, inclusive, on page 43.

Dated this 17 day of March, 1945.

T. J. Hanify, John Ambler, Attorneys for Appellant.

Due and timely service of the foregoing "Appellant's Statement of Points to be Relied Upon and Designation of Parts of the Record to be Printed" acknowledged this 17 day of March, 1945.

Jay C. Allen, Charles R. Carey, Attorneys for Appellee Ralph Rowley. Smith Troy, Attorney General of the State of Washington; R. A. Moen, Assistant Attorney General of the State of Washington, Attorneys for Appellee Department of Labor and Industries.

[fol. 133½] [File endorsement omitted.]

[fol. 134] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—May 28, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted, and the case is transferred to the summary docket.

Mr. Justice Jackson took no part in the consideration or decision of this question.

Endorsed on cover: File No. 49547. Washington, Supreme Court. Term No. 53. Gange Lumber Company, Appellant, vs. Ralph Rowley and Department of Labor and Industries of the State of Washington. Filed March 30, 1945. Term No. 53, O. T. 1945.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 30 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. [redacted] 53

GANGE LUMBER COMPANY,

Appellant,

vs.

RALPH ROWLEY AND DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

JOHN AMBLER,
T. J. HANIFY,
Counsel for Appellants.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Facts of the case	1
Statute under which jurisdiction of Supreme Court is invoked	3
Statute of the State of Washington here challenged	3
Judgment of the Supreme Court of the State of Washington	6
Court appealed from is highest court of the State of Washington	7
How federal question was raised	7
Questions involved are substantial	15
Appendix "A"—Opinion of the Supreme Court of Washington	18

Table of Cases Cited

Arthurn v. *City of Seattle*, 137 Wash. 228, 242 Pac. 16	15
Botica v. *Department of Labor and Industries*, 184 Wash. 573, 52 P. (2d) 332	16
Bryant v. *Zimmerman*, 278 U. S. 63	15
Central Vermont Railway Co. v. *White, Administratrix*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433	17
Cole v. *Department of Labor and Industries*, 200 Wash. 296, 93 P. (2d) 413	16
Cox v. *Department of Labor and Industries*, 177 Wash. 529, 32 P. (2d) 570	16
Eagles v. *General Electric Co.*, 5 Wash. (2d) 70, 104 P. (2d) 912	17
Earle v. *Froedtert Grain & Malting Co.*, 197 Wash. 341, 85 P. (2d) 264	17
Ferguson v. *Department of Labor and Industries*, 168 Wash. 677, 13 P. (2d) 39	16
Fisher's Blend, Inc. v. *Tax Commission*, 297 U. S. 650	7
Gange Lumber Co. v. *Rowley, et al.*, 121 Wash. Dec. 554, 122 Wash. 234	10, 14
Gulf Refining Co. v. *U. S.*, 269 U. S. 125	7

	Page
Hillestad v. *Industrial Insurance Commission*, 80 Wash. 426, 141 Pac. 913	15
Hunter v. *Department of Labor and Industries*, 190 Wash. 380, 68 P. (2d) 224	16
Lane v. *Department of Labor and Industries*, 121 Wash. Dec. 395, 151 P. (2d) 440	9, 16
Lewis v. *Missouri Pacific Railroad Company*, 324 Mo. 269, 23 S. W. (2d) 100	17
Link v. *Receivers of Seaboard Airline Co.*, 73 F. (2d) 149.	17
Morris v. *Orcas Lime Co.*, 185 Wash. 126, 53 P. (2d) 604, 299 U. S. 559, 57 Sup. Ct. 20, 81 L. Ed. 411	17
Mud Bay Logging Co. v. *Department of Labor and Industries*, 189 Wash. 285, 64 P. (2d) 1054, 193 Wash. 275, 75 P. (2d) 579	16
Peoples v. *Hayes*, 4 Wash. (2d) 253, 104 Pac. (2nd) 305.	17
Puget Sound Power & Light Co. v. *King County*, 264 U. S. 22	6
Purdy & Whitfield v. *Department of Labor and Industries*, 12 Wash. (2d) 131, 120 P. (2d) 858	15
Schaefer Bros. Logging Co. v. *Department of Labor and Industries*, 4 Wash. (2d) 720, 104 P. (2d) 747	16
Schmeiling v. *Department of Labor and Industries*, 121 Wash. Dec. 395. 151 P. (2d) 440	16
William Danzer & Co. v. *Gulf & S. S. I. R. Co.*, 268 U. S. 633, 45 Sup. Ct. 612, 69 L. Ed. 1126	17
Wilson v. *Republic Iron & Steel Co.*, 257 U. S. 92	7
Wynand v. *Department of Labor and Industries*, 121 Wash. Dec. 770, 153 Pac. (2d) 302	2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1094

GANGE LUMBER COMPANY, A CORPORATION,
Appellant,
vs.
RALPH ROWLEY AND DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON
Appellees

STATEMENT AS TO JURISDICTION

Pursuant to Rule 12-1 of the Rules of the Supreme Court of the United States, the appellant submits this statement as to jurisdiction showing the basis upon which it contends that this Court has jurisdiction upon appeal to review the action of the Supreme Court of the State of Washington.

Facts of the Case

The appellee Ralph Rowley suffered an injury to his right hand on July 13, 1937 while engaged by the appellant in extra-hazardous industry within the State of Washington, on account of which injury the appellee Rowley filed a Report of Accident and claim for compensation with the appellee Department of Labor and Industries under the Workmen's Compensation Act of said State. (R. 1.)

The claim was allowed and lump sum awards totalling $307.50 were paid to the appellee Rowley on account of the permanent partial disability suffered by him, by an order of the Supervisor of Industrial Insurance dated January 25, 1938 and by a final order of the Supervisor dated March 9, 1938 from which no appeal was taken. (R. 2, 3.)

From the year 1927 until December 3, 1942, the said Workmen's Compensation Act provided that an application to reopen a claim and for additional compensation on account of aggravation of disability occurring after closure of the claim might be filed with the appellee Department of Labor and Industries at any time within three years after such closure, but not thereafter. (Remington's Revised Statutes of Washington, Section 7679 (h); Laws of Washington 1927, Ch. 310, p. 844; Laws of Washington 1929, Ch. 132, p. 338).

On December 3, 1942, there became effective an Act (hereinafter called the "1941 Act"), changing the said limitation period from three to five years (Laws of Washington, 1941, Chapter 209, Section 1, page 633, approved as Referendum Measure No. 22 by the voters of said State at the general election held on November 3, 1942, and being Remington's Revised Statutes of Washington, 1941 Supplement, Section 7679 (h), page 310—see *Wymand* v. *Department of Labor and Industries*, 121 Wash. Dec. 770, — Wn. (2d) —, 153 P. (2d) 302).

The appellee Rowley made no application to reopen his claim at any time within three years after the closure thereof and his right to apply therefor became barred, but subsequent to the effective date of the 1941 Act, the Appellee Rowley, on March 19, 1943, filed his application for reopening and for additional compensation on account of an alleged aggravation of his disability occurring after March 9, 1938, the date of closure of his claim. (R. 4)

Statute under Which Jurisdiction of Supreme Court Is Invoked

The jurisdiction of this Court is invoked under Section 237-a of the United States Judicial Code, as amended by Acts of February 13, 1925, January 31, 1928, and April 26, 1928 (Title 28 U. S. C., Sections 344-a, 861-a and 861-b).

Statute of the State of Washington Here Challenged

The statute of the State of Washington, the validity of which is involved, is a part of Laws of Washington, 1941, Chapter 209, Section 1, which amended Laws of Washington, 1911, Chapter 74, Section 5(h), Remington's Revised Statutes of Washington, Section 7679 (h), as subsequently amended.

Laws of Washington, 1911, Chapter 74

Chapter 74 of the Laws of Washington, 1911, is the original Workmen's Compensation Act of said State (Remington's Revised Statutes of Washington, Section 7673 et seq.). It provided for an accident fund within the treasury of said State, which is now administered by the appellee Department of Labor and Industries, to be used solely for compensating workmen injured in what was defined as extrahazardous employment within the State, or the widows and dependents of deceased workmen. Premiums or contributions were exacted of employers engaged in extrahazardous activities for the support of the accident fund. The Act provided for the filing of claims by injured workmen, or the widows and dependents of deceased workmen, and the allowance of meritorious claims and payment of lump sum awards for permanent partial disabilities, as well as "pensions" in the cases of total permanent disability or death. As originally enacted (Laws of Washington, 1911, Chapter 74, Section 4), the act provided for uniform payments into

the accident fund by all employers covered by the Act. Section 4 was amended in 1931 (Laws of Washington, 1931, Chapter 104, Sec. 1, p. 297, Remington's Revised Statutes of Washington, 1932, Section 7676) to provide, and the act still provides for payments by employers in accordance with their respective cost experiences, that is, the amounts of an employer's payments into the fund vary from time to time in proportion with the amounts paid out of the fund to the employer's workmen, or their widows and dependents. Laws of 1911, Chapter 74, Section 5 (h) read as follows:

> "(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments."

The Constitution of the State of Washington, Article II, Section 37. (Remington's Revised Statutes, Vol. 1, p. 411), provides that no act shall ever be amended by the legislature by mere reference to its title, and that the act revised or the section amended shall be set forth at full length. Subsection (h) remained unchanged, despite several amendments to other portions of Section 5 (Laws of 1913, Chapter 148, page 472; Laws of 1915, Chapter 188, page 686; Laws of 1917, Chapter 28, page 82; Laws of 1919, Chapter 131, page 363; Laws of 1923, Chapter 136, page 396), until 1927 when subsection (h) was amended by insertion of the italicized language below (Laws of Washington, 1927, Chapter 310, page 844):

> "(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate

of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, *made within three years after the establishment or termination of such compensation*, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided, Any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment.*"

Section 5 was amended again in 1929 (Laws of 1929, Chapter 132, page 338) but subsection (h) remained undisturbed then and until the 1941 Act was passed.

Laws of Washington, 1941

Laws of Washington, 1941, Chapter 209, amended the original subsection 5 in most of its subdivisions, for the general purpose of liberalizing the compensation payments to injured workmen, or their widows and dependents. It changed subsection (h) by substituting the word "five" for the word "three" in the body of the subsection and the words "Five (5)" for the word "three" in the proviso. It was held by the Supreme Court of the State of Washington in the case at bar that this amendment permits the reopening of a claim on account of aggravation of disability notwithstanding that the right to apply for such reopening and for additional compensation had become barred under the 1927 and 1929 acts. It is the 1941 Act, as so interpreted, the validity of which is here involved.

Judgment of the Supreme Court of the State of Washington

The judgment of the Supreme Court of the State of Washington was entered on February 19, 1945. The time for taking an appeal began to run from the date of said judgment. (*See Puget Sound Power & Light Company* v. *King County*, 264 U. S. 22, where the time for taking an appeal from a judgment of the Supreme Court of the State of Washington is considered.) The petition for appeal was presented February 28, 1945.

The order of the Supervisor of Industrial Insurance of the appellee Department of Labor and Industries, dated November 25, 1944, granted the application of the appellee Ralph Rowley for a reopening of his claim and directed an award of additional compensation to him (R. 30).

The final order of the Joint Board of the appellee Department of Labor and Industries dated November 27, 1944 reads in part (R. 36):

> "It Is Hereby Ordered That the application of the employer, Gange Lumber Company, for a rehearing of the order of the Supervisor of Industrial Insurance dated November 25, 1944, be and the same is hereby denied."

The judgment of the Superior Court of the State of Washington for Pierce County, upon the appellant's appeal to that Court from the Joint Board's said order, provides in part (R. 48-50):

> "It Is Further Ordered, Adjudged and Decreed that this cause and the plaintiff's herein be, and the same are hereby dismissed with prejudice; that the aforesaid order of the Joint Board dated November 27, 1944 be, and the same is hereby confirmed."

The judgment of the Supreme Court of the State of Washington affirms the said judgment of the Superior Court (R. 56). A judgment of dismissal is final.

Wilson v. *Republic Iron & Steel Company* 257 U. S. 92;

Gulf Refining Co. v. *United States* 269 U. S. 125;

Fisher's Blend, Inc. v. *Tax Commission*, 297 U. S. 650.

Court Appealed from Is Highest Court of the State of Washington

The judgment of the Supreme Court of the State of Washington is that of the highest court in which, under the laws of the State of Washington, such judgment could be had. No further appeal is possible save to the Supreme Court of the United States; hence, the appeal is taken from "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had."

Constitution of the State of Washington, Article IV, Sections 1, 4 and 6.

See:

Remington's Revised Statutes of Washington, 1932, Vol. 1, pp. 422, 425, 428;

Remington's Revised Statutes of Washington, 1932, Vol. 4, Section 1716, p. 10; Section 1737, p. 72; Section 1740, p. 74; Section 1741, p. 75.

How Federal Question Was Raised

The appellee Ralph Rowley made no application to reopen his said claim at any time within three years after the date of closure thereof, nor until March 19, 1943, on which date he filed his application for reopening of his claim and for additional compensation on account of an alleged aggravation of his disability occurring subsequent

to closure of his claim (R. 4). Said application was rejected by order of the Supervisor of Industrial Insurance dated March 24, 1943 on the ground that the same was barred by the provisions of Remington's Revised Statutes, Section 7679(h), (R. 5). Review of an order of the Supervisor of Industrial Insurance is exclusively by petition for rehearing to the Joint Board of the appellee Department of Labor and Industries and thence to the Superior and Supreme Courts of the State of Washington.

Remington's Revised Statutes of Washington, 1943 Supp., Section 7697.

Thereupon the appellee Ralph Rowley filed his application with the Joint Board of the Appellee Department of Labor and Industries for a rehearing of the Supervisor's said order, contending that said Laws of Washington, 1941, Chapter 209, operated retroactively to permit reopening of the appellee Rowley's claim notwithstanding that his right to apply for such reopening had become barred under the provisions of Remington's Revised Statutes, Section 7679(h) (R. 6).

The appellee Rowley's said application for rehearing was denied, and the Supervisor's said order of March 24, 1943 was affirmed by order of said Joint Board Dated April 5, 1943 (R. 7), from which order the appellee Rowley appealed, as provided by law (Remington's Revised Statutes, 1932, Supp., Section 7697) to the Superior Court of the State of Washington for Pierce County (R. 8). The appellant, as the interested and affected employer, appeared in said Court upon said appeal, filing its motion therein for a dismissal of said appeal upon the ground, among others, that said Laws of Washington, 1941, Chapter 209, if it should be interpreted as applying retroactively to permit reopening of barred claims as urged by the appellee Rowley, was in violation of the Fourteenth Amendment to

the Constitution of the United States and was void in its application to appellant (R. 9-10). The question sought to be reviewed here was thus presented by appellant in the first tribunal wherein a hearing on the question was had, that is, in the court of first instance.

Judgment was thereafter entered, on December 10, 1943, granting appellant's said motion and dismissing appellee Rowley's appeal to said Court (R. 11-12), from which judgment the appellee Rowley appealed to the Supreme Court of the State of Washington (R. 13) where the cause was consolidated for hearing and decision with three other causes in said Court involving the same issues (*Lane et al. v. Department of Labor and Industries*, 121 Wash. Dec. (No. 11) 395, —— Wn. (2d) ——, 151 P. (2d) 440). Upon said appeal the appellant reasserted its contention that the 1941 Act, if interpreted as urged by the appellee Rowley, was in violation of the Fourteenth Amendment to the Constitution of the United States and was void in its application to the appellant (R. 15-18).

On August 30, 1944, the Supreme Court of the State of Washington filed its opinion and decision in said consolidated causes, a copy of which is attached hereto and made a part hereof, holding that the 1941 Act applied retroactively to permit reopening of appellee Rowley's claim notwithstanding that his right to reopening thereof had become barred prior to the effective date of said Act and that, so applying, the 1941 Act was not unconstitutional as contended by appellant. In reversing said judgment of the Superior Court and in directing that the appellee Rowley's application for reopening of his claim and for additional compensation be entertained upon its merits by the appellee Department of Labor and Industries, the Supreme Court of the State of Washington said:

"On the constitutional question raised by the employers, we must take into consideration the type of

statute that is now before us and bear in mind that it is a part of the legislation enacted pursuant to the police power of the state. * * *

"There is no constitutional inhibition against the revival of a barred remedy. * * *

"The act of 1941 before us is so plain and all-inclusive in its wording as not to need construction * * * and in passing it the legislative authority has encountered no constitutional inhibitions."

In due time the appellant filed its petition for rehearing of said opinion and decision, asserting again the unconstitutionality of the 1941 Act (R. 19-21).

Appellant's said petition for rehearing was denied by order of the Supreme Court of Washington dated October 4, 1944 (R. 22); 121 Wash. Dec. 554, —— Wn. (2d) ——), and judgment was entered by said Supreme Court on October 16, 1944 in accordance with its said opinion and decision (R. 23). Pursuant to the remittitur of said Supreme Court upon said judgment, the said Superior Court for Pierce County entered judgment on October 19, 1944 reversing the aforesaid order of the appellee Department of Labor and Industries and directing that the appellee Ralph Rowley's application for reopening of his claim and for additional compensation be considered upon its merits by the appellee Department of Labor and Industries (R. 25-26), and an order, dated October 30, 1944, in accordance with said judgment was entered by said Joint Board of the appellee Department of Labor and Industries (R. 27).

Pursuant to said order, the Supervisor of Industrial Insurance caused the appellee Rowley's disability to be investigated (R. 28-29) and, upon such investigation, entered his order dated November 25, 1944 reopening the appellee Rowley's claim and awarding him additional compensation on account of aggravation of his disability occurring after

his claim was originally closed (R. 30). On November 27, 1944, the appellant filed its application for rehearing before the Joint Board of the appellee Department of Labor and Industries of the Supervisor's said order (R. 31-35), which application reads in part:

> "7. That, notwithstanding the aforesaid decision of the Supreme Court of the State of Washington, the 1941 Act, as interpreted by said Supreme Court as aforesaid, and said order of the Supervisor of Industrial Insurance dated November 25, 1944 entered pursuant thereto, insofar as said act and order provide for an award to the claimant although his right to apply for or receive such an award had once become barred, and insofar as said Act and order require the amount of such award to be charged to your petitioner's cost experience under said Workmen's Compensation Act, constitute a taking of the property of your petitioner without due process of law and deny your petitioner the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and are void."

Thereafter the said Joint Board entered its final order, and the final order of the appellee Department of Labor and Industries, dated November 27, 1944, denying appellant's said application for rehearing, which order read in part (R. 36):

> "Whereas it appears to the Board that this claim has heretofore been appealed to the Supreme Court of the State of Washington and that said Court held upon said appeal, in *Lane* v. *Department of Labor and Industries*, 121 Wash. Dec. (No. 11) 395, that the claimant herein was entitled to a consideration of his application for reopening on its merits under Laws of Washington, 1941, Chapter 209, Section 1, and that said law was not in violation of the Fourteenth Amendment to the Constitution of the United States as contended by

the employer herein, and the Joint Board being advised in the premises, and you being hereby notified, now:

"It is Hereby Ordered That the application of the employer, Gange Lumber Company, for a rehearing of the order of the Supervisor of Industrial Insurance dated November 25, 1944, be and the same is hereby denied."

Thereupon the appellant appealed from said order of the Joint Board to said Superior Court for Pierce County (R. 37) where the appellees Ralph Rowley and Department of Labor and Industries filed their motion for judgment dismissing appellant's appeal to said court (R. 45-47) and where appellant filed its motion for judgment on the record (R. 39-42) which read in part:

"7. That, notwithstanding the aforesaid decision of the Supreme Court of the State of Washington, the 1941 act, as interpreted by said Supreme Court as aforesaid, and said orders of the Supervisor of Industrial Insurance dated November 25, 1944 and the Joint Board dated November 27, 1944 entered pursuant thereto, insofar as said Act and orders provide for an award to the defendant Rowley although his right to apply for and receive such an award had once become barred, and insofar as said Act and orders require the amount of such award to be charged to plaintiff's cost experience under said Workman's Compensation Act, constitute a taking of the property of the plaintiff without due process of law and deny plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and are void.

Thereafter said Superior Court entered its judgment, dated December 5, 1944 (R. 48-50), which read in part:

"It appearing to the Court that no issue of fact has been raised herein and that the only issue of law herein is whether Laws of Washington, 1941, Chapter 209,

Section 1 * * * constitutes a taking of the property of the plaintiff Gange Lumber Company without due process of law and denies said plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States; and

"* * *

"It is Therefore Ordered, Adjudged and Decreed, That the aforesaid motion of the plaintiff for judgment upon the record be, and the same is hereby denied * * * to all of which the plaintiff excepts and its exception is allowed; and

"It is Further Ordered, Adjudged and Decreed that this cause and the plaintiff's appeal herein be, and the same are hereby dismissed with prejudice; * * *."

The appellant thereupon appealed from said judgment to the Supreme Court of the State of Washington (R. 51), the appellant urging in its assignments of error (R. 52, 53), the same constitutional grounds as previously urged by it. Such assignments of error to the Supreme Court of the State of Washington appear in the brief of the appellant in that court in accordance with state practice.

Remington's Revised Statutes of Washington, Vol. 4, Sec. 1730, p. 31;

Remington's Revised Statutes of Washington, Pocket Supp., Vol. 1, p. 67.

Such assignments of error were in part:

"2. The Superior Court, in following said decision in the *Lane* cases, erred in holding that said Laws of Washington, 1941, Chapter 209, Section 1, insofar as said statute purports to revive the respondent Rowley's statutory right to apply for reopening of his industrial insurance claim, does not deprive appellant of its property without due process of law or deny appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of

the State of Washington, and said court erred in failing to hold that said statute does so deprive appellant of its property and does deny it the equal protection of the laws.

"3. The Superior Court, in following said decision in the *Lane* cases, erred in holding that the removal by said Laws of Washington, Chapter 209, Section 1, of the bar of limitations to the reopening of the respondent Rowley's claim affected only said respondent's remedies under the Workmen's Compensation Act of the State of Washington and did not affect the substantial rights of the appellant, and said court erred in failing to hold that said removal did affect the appellant's substantial rights.

"4. The Superior Court, in following said decision in the *Lane* cases, erred in holding that the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3 of the Constitution of the State of Washington does not apply to a law, viz., Laws of Washington 1941, Chapter 209, Section 1, enacted in the exercise of the police power of a State.

"5. The Superior Court, in following said decision in the *Lane* cases, erred in holding that the contributions or premiums exacted of an employer by the Workmen's Compensation Act of the State of Washington and paid by the employer into the accident fund maintained by the respondent Department of Labor and Industries under said Act are a license or excise tax."

The Supreme Court of the State of Washington filed its opinion and decision on January 27, 1945 affirming the judgment of Superior Court (122 Wash. Dec. 234, — Wn. (2d) —, — P. (2d) —). In its opinion, a copy of which is attached hereto and made a part hereof, said Supreme Court confirmed its earlier decision holding that the 1941 Act was not in violation of the Fourteenth Amendment to the Constitution of the United States and held that its earlier decision upon the issues, including appellant's contention

upon constitutional grounds, was "the law of the case" upon the second (appellant's) appeal in the case.

Within due time appellant filed its petition for rehearing of said decision of the Supreme Court of the State of Washington, again asserting its contention on constitutional grounds (R. 54).

On February 16, 1945, said Supreme Court denied appellant's said petition and, on February 19, 1945 entered its final judgment, from which this appeal is taken, affirming the judgment of the Superior Court for Pierce County dismissing appellant's appeal to that Court (R. 55, 56).

The opinion and judgment which the Supreme Court of the State of Washington rendered and entered could not have been rendered or entered without denying to appellant all of the rights asserted by it under the constitutional privileges relied upon and said opinion and judgment cannot be rested upon any independent non-federal grounds.

It is submitted that the judgment plainly and definitely draws in question the validity of the statute on the ground of its being repugnant to the Constitution of the United States as required by Section 237 of the Judicial Code, as amended, and that this appeal comes within the proper jurisdiction of this court.

Bryant v. *Zimmerman*, 278, U. S. 63, 67.

Questions Involved Are Substantial

The Workmen's Compensation Act is in derogation of the common law and all rights of injured workmen thereunder are purely statutory.

Remington's Revised Statutes, Section 7676;

Hillestad v. *Industrial Insurance Commission*, 80 Wash. 426, 141 Pac. 913;

Arthur v. *City of Seattle*, 137 Wash. 228, 242 Pac. 16;

Purdy & Whitfield v. *Department of Labor & Industries*, 12 Wn. (2d) 131, 120 P. (2d) 858.

The amount allowed upon a claim under the Workmen's Compensation Act of the State of Washington is charged to the employer's cost experience thereunder and the claim is ultimately paid, to a very large extent, by such employer through its resulting increased premiums.

Remington's Revised Statutes, Supplement, Section 7676;

See

Mud Bay Logging Company v. *Department of Labor and Industries*, 189 Wash. 285, 64 P. (2d) 1054, 193 Wash. 275, 75 P. (2d) 579;

Cole v. *Department of Labor and Industries* (Dissenting Opinion), 200 Wash. 296, 93 P. (2d) 413;

Schaefer Bros. Logging Company v. *Department of Labor and Industries*, 4 Wn. (2d) 720, 104 P. (2d) 747;

Lane et al. v. *Department of Labor and Industries* (Dissenting Opinion), 121 Wash. Dec. (No. 11), 395 at p. 420, — Wash. (2d) —, 151 P. (2d) 440 at p. 453.

Prior to the effective date of the 1941 Act here in question, the lapse of three years after closing of a claim under the Workmen's Compensation Act barred a subsequent application for reopening on the ground of aggravation of disability occurring after closure of the claim.

Schmeiling v. *Department of Labor and Industries*, 167 Wash. 692, 10 P. (2d) 229;

Ferguson v. *Department of Labor and Industries*, 168 Wash. 677, 13 P. (2d) 39;

Cox v. *Department of Labor and Industries*, 177 Wash. 529, 32 P. (2d) 570;

Botica v. *Department of Labor and Industries*, 184 Wash. 573, 52 P. (2d) 332;

Hunter v. *Department of Labor and Industries*, 190 Wash. 380, 68 P. (2d) 224.

A failure to assert a right created by a statute within the time prescribed by the same statute works a destruction of the right.

William Danzer & Co. v. *Gulf & S. I. R. Co.*, 268 U. S. 633, 45 S. Ct. 612, 69 L. ed. 1126;

Central Vermont Railway Co. v. *White, Administratrix*, 238 U. S. 507, 35 S. Ct. 865, 59 L. ed. 1433;

Morris v. *Orcas Lime Co.*, 185 Wash. 126, 53 P. (2d) 604, Cert. den. 299 U. S. 559, 57 S. Ct. 20, 81 L. ed. 411;

Earle v. *Froedtert Grain & Malting Co.*, 197 Wash. 341, 85 P. (2d) 264;

Peeples v. *Hayes*, 4 Wn. (2d) 253, 104 P. (2d) 305;

Eagles v. *General Electric Co.*, 5 Wn. (2d) 20, 104 P. (2d) 912;

Lewis v. *Missouri Pacific Railroad Company*, 324 Mo. 269, 23 S. W. (2d) 100.

An attempt by a state legislature to revive a statutory right which has once expired is in violation of the Fourteenth Amendment to the Constitution of the United States as to one who will suffer a loss as a consequence of such re-revival.

William Danzer & Co. v. *Gulf & S. I. R. Co.*, *supra*, 268 U. S. 633, 45 S. Ct. 612, 69 L. ed. 1126;

Link v. *Receivers of Seaboard Airline Co.*, 73 F. (2d) 149.

Respectfully submitted,

JOHN AMBLER,
T. J. HANIFY,
Attorneys for Appellant.

APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Filed in Clerk's Office, Supreme Court State of Washington, Aug. 30, 1944. Benj. T. Hart, Clerk, by Archie B. Stewart, Deputy.

No. 29288

I. C. LANE, *Appellant*,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON and DEFIANCE LUMBER COMPANY, a Corporation, Employer, *Respondents*

No. 29289

I. C. LANE, *Appellant*,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON and GANGE LUMBER COMPANY, a Corporation, Employer, *Respondents*

No. 29290

RALPH ROWLEY, *Appellant*,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON and GANGE LUMBER COMPANY, a Corporation, Employer, *Respondents*

No. 29291

En Banc (Consolidated)

JOHN MOORE, *Respondent*,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Defendant*, and NORTHWEST DOOR COMPANY, Employer, *Appellant*

Filed Aug. 30th, 1944

This appeal involves the claims of injured workmen for compensation for aggravation of injuries and for which

they had previously received awards. In the two cases of I. C. Lane and in that of Ralph Rowley, the court affirmed the orders of the department of Labor and Industries disallowing the claims on the ground that they had not been made within the time limited by law. In the case of John Moore, the court reversed the order of the department disallowing his claim upon the same ground. On appeal to this court the cases were consolidated. The parties to the appeal will be referred to as the claimants, the employers, and the department.

The questions to be determined are whether the act of 1941 applies to barred claims, and, if so, is it constitutional.

The original act of 1911, chapter 74, p. 345, by § 5 (h), p. 360, provided as follows:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments."

No limitation of time was fixed within which the workman was required to make application to the department of labor and industries. The law remained in this condition until the enactment of chapter 310, Laws of 1927, p. 813, when § 4 (h), p. 844, was amended so as to place a limitation of three years upon the making of a claim for compensation for aggravation of injuries. This amended section was carried forward into chapter 132, Laws of 1929, p. 338, § 2. It was again amended by chapter 209, Laws of 1941 (referendum measure 22), p. 633, § 1 (Rem. Supp. 1941, § 7679), and now reads as follows:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the Director of Labor and Industries, through and by means of the Division of Industrial Insurance, may, upon the application of the beneficiary, made within five years after the establishment or termination of such compensa-

tion, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided*, Any such applicant whose compensation has heretofore been established or terminated shall have five (5) years from the taking effect of this act within which to apply for such readjustment."

At the time this act became effective all of the claims now under consideration were barred by the three-year limitation period.

It is a general rule that a statute fixing a time limitation upon the assertion of a right or the enforcement of an obligation will not be held *by construction* to operate retroactively, and it will be deemed so to operate only when, by its plain terms or by necessary implication, such intention is apparent. It is not necessary, however, that the statute expressly state in words that it shall so operate, or that rights or obligations already barred shall be revived, but it is sufficient if the plain words of the statute carry such meaning and leave no room for doubt.

We have in many cases applied the rule that, where the language of a statute is plain and clear and capable of but one meaning, there is no room for construction and none is needed. *State ex rel. George* v. *Seattle*, 184 Wash. 560, 52 P. (2d) 360; *Carkonen* v. *Alberts*, 196 Wash. 575, 83 P. (2d) 899; *Shelton Hotel Co., Inc.*, v. *Bates*, 4 Wn. (2d) 498, 104 P. (2d) 478; *Smith* v. *Department of Labor & Industries*, 8 Wn. (2d) 587, 113 P. (2d) 57. A very clear and comprehensive statement of the rule is found in 50 Am. Jr. (Statutes) 204, §225, as follows:

"A statute is not open to construction as a matter of course. It is open to construction only where the language used in the statute requires interpretation, that is, where the statute is ambiguous, or will bear two or more constructions, or is of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory in-

terpretation, and the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity."

The legislature has used the language quoted above three different times: in 1927, 1929 and 1941. Each time it spoke on the subject matter involved in the workmen's compensation act it was carrying out a social objective, namely, to give further relief to injured workmen than had been given by previous legislation in view of recognized changed economic conditions. In doing so there could be no reason for any discrimination between injured workmen. The one whose compensation has once been established or terminated but who has not made claim for aggravation of his injuries within the three-year period prescribed, is just as much in need of aid as is one who has done so, or as one who might later make such a claim; and as the legislature did not affirmatively exclude such injured workman, it is very clear that the plain language of this statute is all inclusive. If the statute stopped at the proviso, then all that this court has said about applying statutes of limitation prospectively and that the law in force at the time the claim of an injured workman accrued must govern, would be applicable. It would seem as though the lawmakers sensed this and, to avoid such effect, added the proviso: "*Any* such applicant whose compensation has *heretofore* been established or terminated shall have five (5) years *from the taking effect of this act* within which to apply for such readjustment." (Italics ours.)

We, therefore, hold that the act applies to the claims of the claimants, and that they were timely made.

On the constitutional question raised by the employers, we must take into consideration the type of statute that is now before us and bear in mind that it is a part of the legislation enacted pursuant to the police power of the state.

The employers assert that after a claim of the kind before us is once barred, it cannot be revived by subsequent legislation because a right of immunity in favor of the employer arises which constitutes a vested right and its impairment is protected by constitutional inhibitions. The claimants and the attorney general contend that the act relates only to the remedy of the workman and does not affect any vested right of the employer. Many authorities are cited by the respective counsel. There is a conflict of authority on the general subject, but much of it disappears when the nature and scope of the different statutes are considered.

There are two types of statutes which the courts had to apply. One of them is the statute which either by its plain terms or by the construction given it by the court makes the limitation of time inhere in the right or obligation rather than the remedy. It is sometimes referred to as a statute of nonclaim, and, strictly speaking, is not a statute of limitations at all. In its usual form the statute creates some right or obligation and a time is fixed within which the right must be asserted or the obligation sought to be enforced, or the same will be barred. When the limitation period expires the right or obligation is extinguished and cannot be revived by a subsequent statute enlarging the time limitation. Illustrations of nonclaim statutes in this state are those providing for liens of laborers and materialmen, claims against estates of deceased persons, and claims for damages against municipal corporations.

The courts seem to be in substantial accord that a statute of limitations cannot enlarge the time for the commencement of an action when the time limitation therefor is fixed by contract; also in cases where one has been in possession of property for the period required to bar an action by the real owner for its recovery, the theory being that, by the lapse of the statutory time, title to the property has passed and it cannot be divested by a statutory revival of the right of action to recover its possession. This court has held

that the right to enforce a lien for street improvements cannot be enlarged by statute after the time limit therefor has expired. *Seattle* v. *DeWolfe*, 17 Wash. 349, 49 Pac. 553. In *Earle* v. *Froedtert Grain & Malting Co.*, 197 Wash. 341, 85 P. (2d) 264, and *Peeples* v. *Hayes*, 4 Wn. (2d) 253, 104 P. (2d) 305, it was decided, with reference to a statute relating to actions to recover on the ground of unlawful preferences, that it is not in its strict sense one of limitation at all, but one that goes to the right to recover, and not merely to the remedy. This is the theory of the leading case of *William Danzer & Co.* v. *Gulf & S. I. R. Co.*, 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126, relied on by counsel for the employers.

The other type of statute is one which relates only to the remedy and has nothing to do with any right or obligation, does not inhere in either, and is wholly independent of them. It is a statute of limitations in its strict sense, and, although a remedy may become barred thereunder, the right or obligation is not extinguished. It is a statute of repose.

There is no constitutional inhibition against the revival of a barred remedy. The leading case on the subject is *Campbell* v. *Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483. We have adopted and followed the rule of that case in *Herr* v. *Schwager*, 145 Wash. 101, 258 Pac. 1039. The distinctions between the different types of statutes as bearing upon the question of whether a claim against which a limitation has run can be revived by a subsequent limitation statute, will be found in the annotations and the cases to which they are appended in 36 A. L. R. 1316, 46 A. L. R. 1101, 67 A. L. R. 297, 78 A. L. R. 1294, 133 A. L. R. 384.

There are cases contrary to *Campbell* v. *Holt* and *Herr* v. *Schwager* which hold that, if the remedy is barred, the immunity from suit is a right that cannot be impaired by a statute of revival, but we definitely declined in the *Herr* case to follow them, and we have not departed from the doctrine of that case.

A claim of a workman of the kind before us is a personal one for a further allowance out of the accident fund, and when the nature of the fund is analyzed and the relation-

ship to it of an employer and an injured workman is considered, it readily appears that the act before us is not in any sense a statute of nonclaim, but is of a character such as to have applicable to it the doctrine of the case of *Herr* v. *Schwager*.

When the original act of 1911 came before the court, it was decided that the money an employer paid into the accident fund was a license tax on his privilege to carry on his business. *State ex rel. Davis-Smith Co.* v. *Clausen*, 65 Wash. 156, 117 Pac. 1101. This view was approved in *Mountain Timber Co.* v. *State of Washington*, 243 U. S. 219, 237, 61 L. Ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642, in which it is said:

"In the present case the Supreme Court of Washington (75 Washington, 581, 583), sustained the law as legitimate exercise of the police power, referring at the same time to its previous decision in the *Clausen Case*, 65 Washington, 156, 203, 207, which was rested principally upon that power, but also (pp. 203, 207), sustained the charges imposed upon employers engaged in the specified industries as possessing the character of a license tax upon the occupation, partaking of the dual nature of a tax for revenue and a tax for purposes of regulation."

We followed this viewpoint in *State* v. *Vinther*, 176 Wash. 391, 29 P. (2d) 693; and the same thought is the basis of *State ex rel. Crabb* v. *Olinger*, 196 Wash. 308, 82 P. (2d) 865.

The workmen's compensation act are and its amendments are an exercise of the police power of the state and in their enactment the legislature did not encounter many of the constitutional limitations it might have otherwise. *Raymond Lumber Co.* v. *Raymond Light & Water Co.*, 92 Wash. 330, 159 Pac. 133; *Shea* v. *Olson*, 185 Wash. 143, 53 P. (2d) 615. In the latter case we said, p. 153:

"We next consider the provisions of Art. I, §§3 and 12 of the state constitution and the fourteenth amendment of the United States constitution, relating to due process and the equal protection of the laws.

"None of these constitutional provisions apply to laws enacted by a state legislature in the exercise of its police power. We have repeatedly so held. (Citing authorities.)"

The fact that an employer has a right to appear and contest a claim of an injured workman and to take an appeal from an adverse decision does not give him any right in or to the accident fund, and we have never held that he has any so-called vested right therein. The reason he may contest a claim is that his cost experience would be affected by an unlawful use of the fund. When it is finally decided that a claimant is entitled to compensation, all further interest on the part of the employer ceases, and all procedural and administrative questions are of no concern of his, but lie only between the claimant and the department.

The act took away from the workman his common-law right of action for negligence. In its place it provided for industrial insurance. The employer is taxed to create and maintain an accident fund. The state administers the fund through one of its agencies. The act creating the right of the workman to compensation fixed a time limit within which he must make his claim after the day upon which the injury occurred, or the right thereto accrued, and provided that if he did not do so such claim would not be enforcible; but it did not fix any time limit within which an injured workman whose rate of compensation had been established or his compensation had been terminated might apply for an adjustment in the event of aggravation of his injury thereafter. Provision was made that the department might, "upon its own motion readjust for further application the rate of compensation . . ." The law remained this way until 1927, when it was provided that a workman claiming aggravation must make claim therefor within a three-year period.

The employer has never had anything to say about when a claim for aggravation of injury may be made, and the fact that after sixteen years of operation of the law the legislature decided to require the injured workman claiming aggravation to make his claim within a limited time, did not change the status of the employer with reference to

the accident fund. It did not thereby create a statute of nonclaim. It merely affected the remedy of the injured workman. It was enacted for the benefit of the department so that it would not have to consider stale claims, when perhaps the securing of evidence as to their merit might be difficult or impossible. The claim of the workman is not one against the employer and the limitation period was not made for the employer's benefit.

The limitation periods fixed by the acts of 1927, 1929 and 1941 have no relation to the right to a readjustment of compensation created by the act of 1911, and do not inhere therein, but relate only to the remedy of the claimant. The lapse of time limitation does not build up any immunity in favor of the employer or bring into being any vested right that can be affected if the time limitation is changed. We held in *Matson* v. *Department of Labor & Industries*, 176 Wash. 345, 29 P. (2d) 675, that no vested right of an injured workman was affected when a limitation period was provided where none had existed before, and the same authority exists to enlarge the time for making claims for readjustment, and, for the same reasons given in that case, no vested right of an employer would be affected.

The act of 1941 before us is so plain and all inclusive in its wording as not to need construction. It applies to all applicants for readjustment whose compensation has been established or terminated, and in passing it the legislative authority has encountered no constitutional inhibitions.

The judgments in the Lane and the Rowley cases are reversed, and the judgment in the Moore case is affirmed.

GRAY, *J.*

We concur:

BEALS, *J.*;
STEINERT, *J.*;
BLAKE, *J.*;
ROBINSON, *J.*;
JEFFERS, *J*;
MALLERY, *J.*

I Dissent.

SIMPSON, *C. J.*

MILLARD, J. (dissenting):

While engaged in extrahazardous work in the employ of Defiance Lumber Company, I. C. Lane sustained an injury in January 1927, for which he was allowed compensation by the department of labor and industries and his claim was closed by a departmental order February 28, 1927, from which he did not appeal. Lane applied, January 26, 1943, to the department for a reopening of his claim on the ground that his disability had become aggravated since his claim was closed. The application was denied for the reason that the right to a reopening of the claim was barred under the three-year limitation included in the industrial insurance statute since 1927. Lane then applied for a rehearing before the joint board of the department on the ground that referendum measure No. 22 adopted at the general election November 3, 1942, permitted reopening of a claim upon an application made at any time within five years after the effective date of the measure, despite the fact that the claim was barred before that date. From the order entered by the joint board denying the petition the claimant appealed to the superior court for Pierce county, which affirmed the decision of the department. Plaintiff appealed.

In the second cause Lane was injured in 1935 while engaged in extrahazardous work in the employ of Gange Lumber Company. His claim was closed by the department in January 1936. In 1943 Lane's application for reopening of his claim was denied and on his appeal to the superior court from the order of the joint board denying his petition for rehearing he was unsuccessful. From that judgment plaintiff has appealed.

In the third case Ralph Rowley sustained an injury while engaged in extrahazardous work in the employ of Gange Lumber Company. His claim was closed in 1938 and no steps were taken by him for reopening of the claim until 1943. The procedure in his case is the same as in the Lane cases and he appealed from the judgment of the superior court affirming the order of the department denying his application.

In the fourth case John Moore was injured in 1937 while engaged in extrahazardous work in the employ of Northwest Door Company. His claim was closed March 7, 1939. His application filed in 1943 for reopening of the claim was rejected. An order was entered by the joint board denying his petition for rehearing. His appeal to the superior court from that order resulted in entry of a judgment reversing the order of the department and remanding the cause for reconsideration of application for reopening the claim on its merits. From that judgment the employer appealed.

The original workmen's compensation act (Laws of 1911, Chapter 74, § 5 (h), p. 360) provided

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments."

It will be noted that the statute did not impose any limitation of time upon the right of a claimant to apply for a reopening of his claim on the ground of aggravation of his disability.

The foregoing was not changed until 1927. By laws of 1927, chapter 310, § 4, (h), p. 844 the statute was amended to limit to three years the time within which a claimant might apply for a reopening of his claim on the ground of aggravation of disability. The amended statute reads as follows:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules

in this section provided for the same, or in a proper case terminate the payment: *Provided,* Any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment."

The foregoing was reenacted without any change by Laws of 1929, chapter 132, § 2 (h), p. 338 and remained the same (Rem. Rev. Stat., § 7679 (h)) until Laws of 1941, chapter 209, p. 624 subsequently approved by the people as referendum measure No. 22 became effective December 3, 1942. The only changes made by referendum No. 22 in the aggravation provision of the 1927 statute, as reenacted in 1929, were to substitute the words "five years" for the words "three years" in the body of subsection (h) and to substitute the words "five (5) years" for the words "three years" in the proviso. The subdivision reads as follows:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the Director of Labor and Industries, through and by means of the Division of Industrial Insurance, may, upon the application of the beneficiary, made within five years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided,* Any such applicant whose compensation has heretofore been established or terminated shall have five (5) years from the taking effect of this act within which to apply for such readjustment."

In the Lane and Rowley cases the superior court held that referendum No. 22 was not intended to apply retroactively and therefore granted the employers' motions to dismiss the appeals of the claimants. In the Moore case the court denied the employer's motion and entered judgment reversing the order of the department.

The employers contend

"(1) that those who enacted Referendum No. 22 did not intend it should apply retroactively so as to allow reopening of claims barred by limitation of time when the measure became effective, and that it therefore does not so apply; but (2) if it would so apply, then it is unconstitutional."

The employers concede that referendum No. 22 was intended to apply retroactively so as to extend the time for reopening all claims not barred on the effective date of the referendum measure.

It is the position of claimants that the meaning of the proviso that "Any such applicant whose compensation has heretofore been established or terminated shall have five (5) years from the taking effect of this act within which to apply for such readjustment" is clear, hence there is nothing to construe; that is, the legislature plainly intended that the five-year statute should apply retroactively so as to permit reopening of claims barred by three-year statute of limitations when amendatory five-year statute became effective.

It is argued that such retroactive application will not render the statute unconstitutional as the method of reopening claims is a matter of practice, procedure, and remedy and does not affect any contractual or vested right of employer, employee or the department of labor and industries. It is further insisted that the act is an exercise of the police power of the state and that the power of the state to impose such a license tax upon the industries in furtherance of the state's public policy in caring for workmen injured in industries may not be successfully challenged.

All statutes must be interpreted before they can be applied, hence all statutes are subject to construction, and if there be more than one possible construction, that meaning will be adopted which most reasonably seems to be the one intended by the legislature. See Crawford, Statutory Construction, p. 283, § 175.

It must be presumed that the members of the legislature are familiar with the doctrine announced by this court in Packscher v. Fuller, 6 Wash. 534, 33 Pac. 875, and consistently followed by us for more than a half century, that

where a statute of limitations is amended by simply changing the period of limitation the amendment extends the time for asserting existing claims but does not revive barred claims.

We are committed to the rule that if before the bar of a statute of limitations has become complete the statutory period of limitation is changed, the old law is not modified by a new, so as to give to both statutes a proportional effect; but the time passed is effaced and the new law governs. In other words, the period provided by the new law runs upon all existing claims in order to constitute a bar. The statute in force at the time the action is brought controls, unless the time limited by the old statute for commencing an action has elapsed while the old statute was in force and before the suit is brought, in which case the suit is barred and no subsequent statute can renew the right or take away the bar. Wood on Limitations, 4th edition, Vol. 1, p. 59, § 12; Packscher v. Fuller, 6 Wash. 534, 33 Pac. 875; Moore v. Brownfield, 7 Wash. 23, 34 Pac. 199; Seattle v. DeWolfe, 17 Wash. 349, 45 Pac. 553; Earle v. Froedtert Grain & Malting Co., 197 Wash. 341, 85 P. (2d) 264, and Peeples v. Hayes, 4 Wn. (2d) 253, 104 P. (2d) 305.

"A repeal of the statute of limitations by the legislature, and the enactment of a new statute, have the effect of renewing actions that have not expired before the new statute takes effect; but a statute of limitations which repeals or amends a former statute on the same subject does not revive an action which has been barred by the former statute. It is not retroactive, so as to remove the bar of limitations from a claim already barred at the time the act took effect." Wood on Limitations, 4th edition, Vol. 1, p. 74, § 12b.

The question presented for our determination is whether the facts of the cases at bar fall within the five-year statute. True, in applying the statute, our decision depends upon the intent of the legislature—whether it intended to include or exclude claims barred by the three-year statute of limitations when the five year statute of limitations became effective.

The problem of distinguishing between ascertaining the legislative intent and applying the statute should not un-

duly confuse us. The first consists in discovering what the legislature meant. The second is the determination of whether the facts of a given case are within or without the legislative meaning previously ascertained.

The meaning of the old Bolognian statute which provided that whoever drew blood in the streets should be severely punished was certainly clear upon its face. Could it apply to the case of a barber who opened a vein of a patient in the street?

"In 1 Blackstone's Commentaries, 91, the learned author, speaking of the construction of statutes, says: 'If there arise out of them any absurd consequences manifestly contradictory to common reason, they are, with regard to those collateral consequences, void * * * When some collateral matter arises out of the general words, and happens to be unreasonable, then the judges are, in decency, to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it,' and he gives as an illustration, if an Act of Parliament gives a man power to try all causes that arise within his Manor Dale, yet, if a cause should arise in which he himself is party, the Act is construed not to extend to that because it is unreasonable that any man should determine his own quarrel.

"There was a statute in Bologna that whoever drew blood in the streets should be severely punished, and yet it was held not to apply to the case of a barber who opened a vein in the street. It is commanded in the Decalogue that no work shall be done upon the Sabbath, and yet giving the command a rational interpretation founded upon its design the Infallible Judge held that it did not prohibit works of necessity, charity or benevolence on that day." Riggs v. Palmer, — N. Y. —, 5 L. R. A. 340

The construction for which claimants contend is contrary to reason and could not be attributed to lawmakers in their right senses. That it must be presumed that the legislature when it enacted the five-year limitation statute was aware of the rule that a legislative attempt to revive

a statutory right once expired is unconstitutional needs no citation of sustaining authority. The imputation implicit in claimants' position is that our lawmakers were ignorant of the rule. What could be more unreasonable than to suppose that it was the legislative intention to knowlingly pass an invalid act? No such purpose may be ascribed to the lawmakers.

The argument that plainly the legislature intended—and that it did not thereby exceed its powers—that the provisions of the statute should apply retroactively so as to allow reopening of claims barred by limitation of time when referendum No. 22 (Laws of 1941, chapter 209) changed the limitation period in which to apply for a reopening of claims from three to five years is not sound. It is insisted that as the act is remedial only, and since it is a valid exercise of the police power it is not violative of the constitutional provisions relating to due process and the equal protection of the laws.

We are aware of the doctrine that as a general rule legislation which relates alone to procedure or to legal remedies will not be subject to the rule that statutes should not be given a retroactive operation. It should be borne in mind, however, that if a statute which relates to procedure or to legal remedy interferes with vested rights it will be subject to the general rule against retroactive operation. A cause of action once barred by a statute of limitations can not be revived or the right of defense to an action when once acquired can not be affected by a subsequent amendment or repeal of a statute, and the right to set up the bar of such a statute is a vested right which can not be taken away by legislation as it would be deprivation of property without due process of law. Crawford, Statutory Construction, § 285.

We can not too strongly stress that all rights of injured workmen under the workmen's compensation act, which is in derogation of the common law, are statutory. Rem. Rev. Stat., §7673. If a statutory right has once expired the legislature can not revive that right. Danzer & Co. v. Gulf & Ship Island Railroad Co., 268 U. S. 633.

We find no respectable authority for the position that a time limitation prescribed in the statute upon the right

created by the same statute is merely a matter of remedy and not of substance. The three-year statute created a right and prescribed a period of time in which to assert that right. Compliance with the limitation of time prescribed constituted a condition precedent to the enjoyment of the right. It is not material whether the limitation is considered as going to the claimants' right or to the claimants' remedy. The statutory right created expired upon failure to assert the same within the statutory period prescribed. Until the enactment of Laws of 1941, chapter 209, became effective the lapse of three years after the closing of a claim barred a subsequent application for reopening of the claim on the ground of aggravation of injury. Hunter v. Department of Labor and Industries, 190 Wash. 380, 68 P. (2d) 224.

In holding that statutes of limitation which relate merely to the remedy, do not give vested rights, and that the limitation provided for in the act simply defeats the remedy, the court said in Fannin County v. Renshaw, (Tex), 29 S. W. (2d) 476, 478:

"There is an essential distinction between a statute simply limiting the remedy and a statute which not only bars the remedy but also extinguishes the right to the thing or property in question. In the one case the right is extinguished, while in the other the right still exists but the remedy therefor is taken away."

The author's observation in note to §285, Crawford, Statutory Construction, that from a practical standpoint there is no real difference whether the right is extinguished or the remedy for the enforcement of the right is barred, is apt.

In Mattson v. Department of Labor and Industries, 176 Wash. 345, 29 P. (2d) 675, we held that an injured workman's rights under the workmen's compensation act being purely remedial, no vested rights were affected by Laws of 1927, chapter 310, which limited to three years the period in which the workman could apply for readjustment of compensation established or terminated prior to the enactment of said limitation despite the fact that Laws

of 1923, chapter 136, in which there was no time limitation within which to apply for readjustment was repealed by Laws of 1927, chapter 310.

True, the legislature, without violation of the guaranties of due process of law, may extend the period of limitations and may make such extension applicable to causes of action which have already accrued. See 12 C. J. 1224. The legislature may also reduce the period and make such reduction applicable to existing causes of action subject, however, to the conditions that it may not entirely take away a right to sue nor so unreasonably shorten the period as practically to take away all remedy. We do not agree that a time limitation prescribed in the statute upon the right created by the same statute is merely a matter of remedy and not of substance. Nor do we agree that the legislature can remove a statutory bar to a cause of action that has already become complete.

In Mattson v. Department of Labor and Industries, *supra*, as in State ex rel Berwind Fuel Co. v. District Court, — Minn. —, 164 N. W. 812, it was unsuccessfully contended that, when an act fixed no limitation upon the time within which a workman could recover under the workmen's compensation act (during the life of which the workman sustained an injury), a subsequent act limiting the time to recover under the workmen's compensation act, did not apply to claims that accrued prior to the enactment of the second law.

In Davis & McMillan v. Industrial Accident Commission, — Calif. —, 246 Pac. 1046, 46 A. L. R. 1095, the supreme court of California held that the *legislature may extend* the *time for filing claims* under the workmen's compensation act *before* the *time fixed has expired* as there is no vested right in the running of the statute of limitations until it has completely run and barred the action.

In Mattson v. Department of Labor and Industries, 176 Wash. 345, 29 P. (2d) 675, 293 U. S. 151, the United States Supreme Court held that the 1927 amendment of the compulsory workmen's compensation act of this state limiting the time to three years within which a claim could be reopened for the readjustment of compensation on account of

aggravation of the disability did not deny due process of law to one who sustained compensable injuries while a preexisting statute was in effect though the preexisting statute contained no limitation as to the time within which such right might be asserted.

We find no comfort in Mattson v. Department of Labor and Industries, *supra*, for claimants. It is not authority for their contention that a legislative attempt to revive a statutory right once expired is constitutional. See 16 C. J. S. 685.

In Decker v. Pouvailsmoth, 253 N. Y. 1, 168 N. E. 442, an infant under fifteen years of age was injured in the course of hazardous employment. Notice of injury was promptly given in his behalf but no claim for compensation was filed within a year after the accident, hence the right to claim compensation was barred in the absence of some exception thereto by the statute which provides that the right to claim compensation shall be barred unless within one year after the accident a claim for compensation shall be filed with the commissioner of the department of workmen's compensation. A guardian ad litem was appointed who instituted an action for the infant against the employer to recover damages under the provisions of a statute which it was claimed gave a right of action for breach of statutory duty in employing a child under sixteen years of age. A judgment recovered in the action was reversed on the ground that the workmen's compensation law provided an exclusive remedy. A year later, but nearly five years after the injury, the father of the infant presented a formal claim for compensation in behalf of claimant. The only question presented was whether the claim was barred by the statute of limitations.

At the time of the accident the workmen's compensation statute provided that no limitation of time would run as against any person who was mentally incompetent or a minor dependent so long as he had no committee or guardian or next friend. The court held that the parent of the child as guardian of the person was the proper person to file the claim for compensation and that the bar of the statute prevailed when the parent neglected to file the claim for com-

pensation within one year after the accident as provided by the statute.

In 1922 (this was after the statute of limitations had run against the claimant) the legislature materially amended (see New York Laws of 1922, chapter 615) and renumbered §116 of the workmen's compensation act. The new section (§115) reads:

"No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor so long as he has no committee or guardian."

In the court's opinion is the statement that the purpose of the legislature was clear and that all minors were brought within the protection of the statute; that "guardian" as used in the statute might reasonably be construed as meaning a guardian appointed by the court and charged with the duty of protecting the property interest of his ward.

"Such is the meaning of the word as used in Workmen's Compensation Law, §16, sub. 2, providing that the board may in its discretion require the appointment of a guardian for the purpose of receiving the compensation of a minor child."

The court further stated that such a statute might be made retroactive without impairing any constitutional rights of the employees but that the legislature had not indicated that the amended act should apply to cases where the statute had already run, hence

"The court may not give a retroactive effect to a statute to revive claims already barred under the old section unless the legislative purpose is defined by express language or by necessary inference."

Laws of 1927, chapter 709, of the laws of New York was enacted for the relief of claimant Decker and was intended to revive his claim. The statute authorized Decker to file a claim for compensation under the workmen's compensation law for injuries sustained in 1919 notwithstanding the failure to file his claim within the time prescribed by the workmen's compensation statute. The court held that the fore-

going act for the relief of claimant Decker denied to the employer equal protection of the laws by singling out one of a class for special burdens and obligations and that one person should not be subjected to liability from which all others in like circumstances are exempted.

In Peeples v. Hayes, 4 Wn. (2d) 253, 104 P. (2d) 305, a debtor gave alleged preference in 1930 and again 1933. In 1937 a receiver was appointed who brought suit in 1938 in compliance with the statute which required that such suit must be instituted within six months from the date of the application for his appointment. The trial court held that the action was barred by statute of limitations prior to the date of the appointment of the receiver, who insisted that the statute (Rem. Rev. Stat., §5831-1) which provided for suit to be commenced within six months after the application for appointment of receiver was exclusive and permitted the action.

We affirmed the judgment, agreeing with the trial court that while the statute under which the receiver was appointed created both the right and a bar to its enforcement yet that statute did not have the effect of reviving a cause of action which had already been barred by a statute of limitations; that is, the statute did not create a new cause of action in the receiver but merely authorized him to assert any claim which was in existence at the time of his appointment.

By Laws of 1923, chapter 28, Remington 1927 (Sup.) §159, the legislature plainly expressed in the following language an intention to revive a claim barred by ordinary general statute of limitations:

"Limitation of Actions

"An act relating to limitation of actions and the accrual thereof and applying to actions now barred as well as those not barred, and amending section 159 of Remington's Compiled Statutes * * *

"An action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation: Provided, however, The

cause of action for such penalty or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitation, or the bar thereof, even though complete, * * * and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitation, or the bar thereof, even though complete, shall exist and be enforcible * * *."

In Herr v. Schwager, 145 Wash. 101, 258 Pac. 1039, cited by claimants in the cases at bar in support of their position, we held that the foregoing statute of limitations as to certain actions after the limitation had run operated on the remedy only and did not affect any vested right. We followed Campbell v. Holt, 115 U. S. 620, for the reason that the liability of defendants for diverting the assets of an insolvent corporation to the prejudice of the rights of a creditor of the corporation existed at the common law.

Danzer & Co. v. Gulf & Ship Island Railroad Co., 268 U. S. 633, is decisive of the question in the cases at bar and distinguishes Campbell v. Holt, 115 U. S. 620, which, like Herr v. Schwager, *supra*, involved a common law cause of action and ordinary statute of limitations.

In Campbell v. Holt, *supra*, the legislature of the state of Texas repealed an ordinary statute of limitations under which the plaintiff's remedy at common law on contract had been barred. It was held by a divided United States Supreme Court that the removal of the bar and entry of judgment against defendants did not deprive them of their property without due process of law. There is no distinction in principle between Campbell v. Holt, *supra*, which has been repudiated by a majority of appellate courts, and Herr v. Schwager, *supra*.

In Danzer & Co. v. Gulf & Ship Island Railroad Co., *supra*, the interstate commerce act created a right against a railroad in favor of one who was damaged by the railroad's misrouting of a shipment. The act provided that all complaints for recovery of damages should be filed within two years from the time the cause of action accrued and not afterward. The United States supreme court held that the right of a shipper to an award of damages result-

ing from misrouting of his goods by a carrier was both created and limited by the interstate commerce act, therefore the lapse of time not only barred the remedy but also destroyed the liability of defendant to plaintiff. The right in that case, as in the cases at bar, was a statutory right which had expired therefore the legislative branch of government could not revive that right. The court said:

"We need not re-examine the doctrine of *Campbell* v. *Holt*, 115 U. S. 620, as it is plain that case does not apply. That was an action on a contract for the recovery of money. By a state statute of limitations, the right of action had been barred. The statute was repealed before the action was commenced. It was held that the action could be maintained and that such repeal did not deprive the debtor of his property without due process of law in violation of the Fourteenth Amendment. The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the statute of limitations related to the remedy only, and that the removal of the bar was not unconstitutional. The opinion distinguishes the case from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability.

Herr v. Schwager, *supra*, and Campbell, v. Holt, *supra*, upon which claimants rely, are not in point, hence it is not material to the cases at bar whether they are correctly decided.

In Bussey v. Bishop, 169 Ga. 251, 150 S. E. 78, 67 A. L. R. 287, in affirming a judgment which set aside an award in favor of claimant in a proceeding under the workmen's compensation statute the court held, under one of the provisions of the constitution of that state that no retroactive law shall be passed that the legislature can not revive a right of action which was barred by the statute of limitations in existence prior to the passage of the reviving act.

Particularly pertinent is the following language of the opinion:

"Most of the decisions which hold contrary to the ruling that the Legislature cannot revive a cause of action barred by the statute of limitations are based upon the ruling made in Campbell v. Holt, supra, in which a distinction was made between a statutory bar operating to invest persons with title to property, and a bar which constitutes merely a defense to a personal demand. Mr. Justice Miller, who delivered the opinion of the majority in that case gave the following reason for such distinction.

" 'We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we got beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution. We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case.'

"The reply to this contention by Mr. Justice Bradley, who dissented, and with whom Mr. Justice Harlan concurred, seems to be unanswerable. In his dissent Justice Bradley said:

" 'Now, an exemption from a demand, or an immunity from prosecution in a suit, is as valuable to the one party as the right to the demand or to prosecute the suit is to the other. The two things are correlative, and to say that the one is protected by constitutional guaranties and that the other is not seems to me almost an absurdity. One right is as valuable as the other. My property is as much imperiled by an action against me for money as it is by an action against me for my land or my goods. It may involve and sweep away all that I have in the world. Is not a right of defense to such an action of the greatest value to me? If it is not property in the sense of the Constitution, then we need another amendment to that instrument. But it seems to me that there can hardly be a doubt that it is property. The immunity from suit which arises by operation of the statute of limitations is as valuable a right as the

right to bring the suit itself. It is a right founded upon a wise and just policy. Statutes of limitation are not only calculated for the repose and peace of society, but to provide against the evils that arise from loss of evidence and the failing memory of witnesses. It is true that a man may plead the statute when he justly owes the debt for which he is sued; and this has led the courts to adopt strict rules of pleading and proof to be observed when the defense of the statutes is interposed. But it is, nevertheless, a right given by a just and politic law, and, when vested, is as much to be protected as any other right that a man has. The fact that this defense pertains to the remedy does not alter the case. Remedies are the life of rights and are equally protected by the Constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away. This court has frequently held that to deprive a man of a remedy for enforcing a contract is itself a mode of impairing the validity of the contract. And, as before said, the right of defense is just as valuable as the right of action. It is the defendant's remedy. There is really no difference between the one right and the other in this respect.'

"We can see no valid reason why a claim which is barred by the statute of limitations can be revived and restored by an act of the Legislature in the same jurisdiction. This is especially true, as we have shown, where the statute creating the claim distinctly provides that the claim shall be forever barred, if not filed with a given tribunal within the period of limitation named in the statute. The requirement that the claim for compensation shall be filed with the Industrial Commission within one year after the accident is an essential ingredient, and the right ceases and terminates where no action is so commenced at the expiration of that time. Where a statute gives a new right of action not existing at common law and prescribed the time within which it may be enforced, the time so prescribed is a condition to its enforcement, an element in the right itself, and the right fails with the failure to apply for relief within the allotted time."

See Krause v. Rarity, — Cal. —, 293 Pac. 62, 77 A. L. R. 1327, and Annotations 36 A. L. R. 1316, et. seq., on the question of the power of legislature to revive a right of action barred by limitation. See 34 Am. Jur. pp. 33-39, §§27-35, on the subjects of modification or repeal of statute of limitation, enlarging of statutory period, suspension of operation of statute, retrospective statutes, and power of legislature to revive an action which has become barred by statute of limitation.

Claimants insist that as the statute in question is an exercise of the police power of the state it is not violative of constitutional provisions relating to due process and the equal protection of the laws. If an enactment is a valid exercise of the police power it, as stated in Sutherland, Statutory Construction, 3rd edition, vol. 2 §2203, "does not lack due process, nor are contractural obligations violated."

While the police power is an attribute of sovereignty which exists without express declaration, a limitation upon it is that it must not violate any direct or positive mandate of the constitution. She v. Olson, 185 Wash. 143, 186 Wash. 700, 53 P. (2d) 615, 59 P. (2d) 1183, 111 A. L. R. 998.

The police power is not a universal solvent by which all constitutional guaranties and limitations can be loosened and set aside, regardless of their clear and plain meaning, nor is it a substitute for those guaranties. The exercise of the police power is limited in that it may not unreasonably limit rights guaranteed by the federal and state constitutions. The constitutional guaranty of the right of property protects it from unjustifiable impairment or abridgment by legislative edicts:

"While it is difficult, if not impossible, to define precisely the limits of the police power, there must in the very nature of things be some limit to it; for otherwise the guaranties of written constitutions would be little more than mere precatory and directory suggestions without force or life, affording to the citizen only a false and illusory protection against the invasion of his rights by the state, and his security would depend not upon constitutional guaranties, but upon the will of the state in exercising an unlimited police power." Goldman v. Crowther, 147 Md. 282, 128 Atl. 50, 38 A. L. R. 1455.

The workmen's compensation act, as stated above, is in derogation of the common law and all rights of injured workmen thereunder are statutory. Rem. Rev. Stat. §7673. The amount allowed under the act upon a claim is charged to the employer's cost experience as provided by the statute and the claim is ultimately paid, to a large extent, by such employer through those resultant increased premiums. Rem. Rev. Stat., §7676; Mud Bay Logging Co. v. Department of Labor and Industries, 189 Wash. 285, 64 P. (2d) 1054, 193 Wash. 275, 75 P. (2d) 579. See, also St. Paul & Tacoma Lumber Co. v. Department of Labor and Industries, 119 Wash. Dec. 682, — P. (2d) —.

State v. Vinther, 176 Wash. 391, 29 P. (2d) 693, State ex rel. Davis-Smith Company v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, and Mountain Timber Company v. Washington, 75 Wash. 581, 135 Pac. 645, 243 U. S. 237, are cited in support of the argument that the fund out of which the claims of workmen are paid are license taxes exacted of employers for the privilege of engaging in industries, therefore the legislature may, and it has, constitutionally removed the bar of the three-year statute of limitations by enactment of the five-year statute.

All that we held in State v. Vinther, *supra*, was that the state in suing for the benefit of the accident fund, under one of the provisions of the workmen's compensation act, on an assigned claim for the death of a workman acted in its sovereign capacity and not for the benefit of private individuals, therefore the statute of limitations could not run against the sovereign state. It is true that in the course of our opinion we indulged in gratuitous observations concerning the character of the accident fund but that language was not necessary to our decision and should not have appeared in the opinion. The same criticism may be justly leveled at our opinions in State ex rel. Davis-Smith Company v. Clausen, *supra*, and Mountain Timber Company v. Washington, *supra*. A careful examination of the three cases cited will convince an understanding reader that the basis of the decision in each of the three cases was not that stated by claimants in the cases at bar.

The contributions paid by the various employers into the accident fund are not license taxes exacted of employers for

the mere privilege of engaging in business. The contributing employers have such a vested right or interest in the fund created by their contributions as to entitle them to an appeal to the courts from the department's award to a claimant. The employer has such a material interest in that fund that reviewing courts, although appealing employer may not supersede the department's award, will suspend the operation of the department's order making the award pending disposition of that appeal from the order to the superior court and from the judgment of the superior court to this court. See Mud Bay Logging Co. v. Department of Labor and Industries, *supra,* in which we held in a seven to two *en banc* decision that the contributions paid by the various employers into the accident fund were not taxes exacted from employers for the privilege of engaging in business. In State ex rel. Crabb v. Olinger, 196 Wash. 308, 82 P. (2d) 865, we refused to recede from that position and in St. Paul & Tacoma Lumber Co. v. Department of Labor and Industries, 119 Wash. Dec. 682, — P. (2d) —, we again stressed our prior holdings that an employer contributing to the accident fund has a material interest in that fund, a vested right therein of which he may not be deprived without due process of law.

In Danzer & Co. v. Gulf & Ship Island Railroad Co., *supra,* the United States Supreme Court held that a legislative attempt to revive a statutory right, such as is involved in the cases at bar, once expired is unconstitutional. There is no respectable authority contrary to that decision.

The warning voiced in dissenting opinion of the late Chief Justice Chadwick in Kuehl v. Edmonds, 91 Wash. 195, 157 Pac. 850, is as challenging and the language employed as apt in these parlous days as when uttered in 1916. In pleading for stability, a government of laws and not of men, that great jurist said:

"It (the majority opinion) will encourage those who, in these times of shifting sentiment, say that some courts never make a precedent and never follow one."

The question presented is whether a cause of action (logically, there is no difference whether the right is ex-

tinguished or the remedy for the enforcement of the right is barred) once barred by a statute of limitations can be revived or the right of defense to an action when once acquired can be affected by a subsequent amendment or repeal of the limitation statute.

I am still of the view that the right to set up the bar of such a statute is a vested right which can not be taken away by legislation as it would be deprivation of property without due process of law. The majority opinion invades the right of the employer to whom this court has given the right of appeal in this class of cases. Only by reason of his interest in the fund may the employer be granted the right of appeal.

There is no respectable authority contrary to Danzer & Company v. Gulf & Ship Island Railroad Co., *supra*, in which the United States Supreme Court held that a legislative attempt to revive a statutory right, such as is involved in the case at bar, once expired, is unconstitutional.

The *raison d'etre* for the present indefensible position of the majority may be, as argued by one of the members of this court, "The human element," (change of judicial personnel) and probably the desire of that new personnel to favor, "in view of the social aspects (the Lorelei to which we have too long listened and which is luring the Ship of State on to the reefs) of the entire legislation," one class over another. To that program of inequality and legal instability I can not subscribe.

The judgments in the Lane and Rowley cases should be affirmed. The judgment in the Moore case should be reversed.

MILLARD, *J.*

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 29541

En Banc

GANGE LUMBER COMPANY, a Corporation, *Plaintiff and Appellant,*

v.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Defendants and Respondents*

Filed January 27th, 1945

As stated in appellant's brief, this is the second time this cause has been before this court. The action as originally commenced before the Department of Labor and Industries, was entitled Ralph Rowley, plaintiff, v. Department of Labor and Industries, defendant, Gange Lumber Company, employer.

The above proceeding was commenced by filing with the department on or about July 30, 1937, a report of accident by Ralph Rowley, claimant, and Gange Lumber Company, employer. The original claim was closed March 1, 1938. On March 13, 1943, Mr. Rowley made an application to reopen his claim. On March 24, 1943, the department, without passing on the merits of the application, entered an order to the effect that it was without authority to take further action on the claim, as more than three years had expired since the original claim was closed. Mr. Rowley then appealed to the joint board for review of the order of March 24, 1943, made by the supervisor, contending that under Rem. Supp. 1941, § 7679(h), he had five years from the effective date of the act last mentioned, to apply for readjustment of his original claim on the ground of aggravation.

On April 5, 1943, the joint board entered an order affirming the action of the department. On April 19, 1943, Mr. Rowley appealed from the order of the joint board to the

superior court of Pierce county. On October 27, 1943, the employer, Gange Lumber Company, filed in superior court a motion to dismiss the cause and appeal on the following grounds: (1) That the order of the joint board dated April 5, 1943, affirming the order of the supervisor dated March 24, 1943, denying the plaintiff's (Mr. Rowley's) application to reopen his claim on the ground that said application and the reopening of said claim were barred by the provisions of Rem. Rev. Stat., § 7679(h), being Laws of 1911, chapter 74, § 5(h), as amended by Laws of 1927, chapter 310, § 4, is in accordance with law. (2) That under the provisions of Rem. Rev. Stat., § 7679(h), plaintiff's right, if any, to reopening of his claim and additional compensation, on the alleged ground that his disability became aggravated after his claim was closed on March 1, 1938, expired by lapse of time prior to March 19, 1943, the date he filed his application for reopening, and said order of the joint board is therefore in accordance with law. (3) That said order of the joint board, rejecting plaintiff's contention that he was authorized by Laws of 1941, chapter 209, § 1, referred by petition to the people and adopted by them as referendum No. 22 on November 3, 1942, which became effective on December 3, 1942, to apply for a reopening of his claim for aggravation as aforesaid, is in accordance with law. (4) That if Laws of 1941, chapter 209, § 1, adopted by the people as aforesaid, is construed as urged by plaintiff, such law is in violation of Art. I, § 3, and Art. I, § 23, of the constitution of the state of Washington, and is void. (5) That if said Laws of 1941, chapter 209, § 1, adopted by the people as aforesaid, is construed as urged by plaintiff, said law is in violation of Art. I, § 10, clause 1 of the constitution of the United States of America, and of the fourteenth amendment to the constitution of the United States of America, and is void.

On December 10, 1943, the superior court for Pierce county made and entered an order dismissing Rowley's appeal, and affirming the order of the department closing Rowley's claim. From the order dismissing the appeal, Rowley duly appealed to this court. On appeal to this court, the Rowley case was consolidated with I. C. Lane

v. Department of Labor and Industries, No. 29288 of this court, I. C. Lane v. Department of Labor and Industries, No. 29289, and John Moore v. Department of Labor and Industries, No. 29291, and the above appeals will be referred to as Lane v. Department of Labor and Industries, reported in 121 Wash. Dec. 395, 151 P. (2d) 440. In order that it may be understood what questions were before the court, and decided by it on the appeals last above referred to, we quote from the opinion:

"This appeal involves the claims of injured workman for compensation for aggravation of injuries and for which they had previously received awards. In the two cases of I. C. Lane and in that of Ralph Rowley, the court affirmed the orders of the department of labor and industries disallowing the claims on the ground that they had not been made within the time limited by law. In the case of John Moore, the court reversed the order of the department disallowing his claim upon the same ground. On appeal to this court, the cases were consolidated. The parties to the appeal will be referred to as the claimants, the employers, and the department.

"*The questions to be determined are whether the act of 1941 applies to barred claims, and, if so, is it constitutional.*" (Italics ours.)

The opinion concludes as follows:

"The act of 1941 before us is so plain and all-inclusive in its wording as not to need construction. It applies to all applicants for readjustment whose compensation has been established or terminated, and in passing it the legislative authority has encountered no constitutional inhibitions.

"The judgments in the Lane and the Rowley cases are reversed, and the judgment in the Moore case is affirmed."

The remittitur from the court went down, and was filed in the superior court for Pierce county on October 17, 1944. Thereafter and on October 19, 1944, said court entered judgment on the remittitur in the case of Ralph Rowley v. Department of Labor and Industries, and Gange

Lumber Company, employer. Said judgment vacated the former judgment entered by the Superior Court, and reversed the order of the joint board, and remanded the cause to the department to consider upon its merits, after the introduction of evidence at an appropriate hearing.

On November 25, 1944, the department reopened the claim, and entered an order allowing additional compensation to Mr. Rowley. The employer, Gange Lumber Company, filed its application for rehearing before the joint board, and on November 27, 1944, the joint board, after a hearing, entered an order denying the employer's application for a rehearing, stating as its reason therefor, in part as follows:

"IT IS HEREBY ORDERED, That whereas it appears to the board that this claim has heretofore been appealed to the supreme court of the state of Washington and that said court held upon said appeal, in *Lane* v. *Department of Labor and Industries*, 121 Wash. Dec. (No. 11) 395, that the claimant herein was entitled to a consideration of his application for reopening on its merits under Laws of Washington, 1941, Chapter 209, Section 1, and that said law was not in violation of the 14th Amendment to the constitution of the United States as contended by the employer herein, and the joint board being advised in the premises, and you being hereby notified, now:

"IT IS HEREBY ORDERED that the application of the employer, Gange Lumber Company for a rehearing of the order of the supervisor of Industrial insurance dated November 25, 1944, be and the same is hereby denied."

The employer, Gange Lumber Company, duly appealed from the order of the joint board, to the superior court of Pierce county, and on December 5, 1944, filed in the superior court its motion for judgment on the record, and on the same date Ralph Rowley and the department of labor and industries filed motions for judgment of dismissal of the appeal of the Gange Lumber Company.

On December 5, 1944, the superior court entered an order granting the motions of Ralph Rowley and the department,

and entered a judgment of dismissal. This judgment recited in part:

"* * * and it appearing to the court that no issue of fact has been or is raised herein and that the only issue of law herein is whether Laws of Washington, 1941, chapter 208, § 1, insofar as it permits the reopening of the industrial insurance claim of the defendant Ralph Rowley and the award made to said defendant upon such re-opening by the order herein of the Supervisor of Industrial Insurance dated November 25, 1944, and the charging of the amount of said award to the cost experience of the plaintiff Gange Lumber Company under the workmens' compensation act of the state of Washington, constitutes a taking of the property of the plaintiff Gange Lumber Company without due process of law and denies said plaintiff the equal protection of the laws in violation of the 14th amendment to the constitution of the United States; and

"It appearing further to the court that this cause has heretofore been before the court in its cause No. 89046 wherein judgment was entered on December 10, 1943, from which judgment the defendant Ralph Rowley appealed to the supreme court of Washington; that said appeal was consolidated with three other causes upon appeal before said court and was decided in *Lane* v. *Department of Labor and Industries*, 121 Wash. Dec. (No. 11) 395; that the aforesaid issue of law was raised between the parties hereto in said appeal and was decided therein by said supreme court adversely to the present contention of the plaintiff herein; and

"The court being of the opinion that said decision of the supreme court of Washington is a determination of the aforesaid issue of law which is conclusive upon this court in favor of the defendants and against the plaintiff, and the court being advised in the premises,

"It Is Therefore Ordered, Adjudged and Decreed, that the aforesaid motion of the plaintiff for judgment upon the record be, and the same is hereby denied and that the motions of the defendants Ralph Rowley and Department of Labor and Industries of the state of Washington be, and

each thereof is hereby granted to all of which the plaintiff excepts and its exception is allowed; and

"It Is Further Ordered, Adjudged and Decreed, that this cause and the plaintiff's appeal herein be, and the same are hereby dismissed with prejudice; that the aforesaid order of the joint board dated November 27, 1944, be, and the same is hereby confirmed."

From the above judgment, the Gange Lumber Company has appealed to this Court. Appellant states in its brief that the questions to be determined on this appeal are:

"1. Did Laws of Washington chapter 209, § 1, amending the workmens' compensation act by changing the period for applying to reopen a claim under said act from three to five years, operate to permit reopening of respondent Rowley's claim notwithstanding that his right to apply for such reopening had become barred under the amended law?"

Following the above question in appellant's brief, it states: "Affirmed by the superior court upon the authority of Lane et al. v. Department of Labor and Industries, 121 Wash. Dec. (No. 11) 395."

The questions continue as follows:

"2. Is said chapter 209, if it applies as interpreted by the superior court, in violation of the fourteenth amendment to the constitution of the United States and of Article 1, § 3 of the constitution of the state of Washington?"

Following this question in appellant's brief, it states: "Negatived by the superior court upon authority of Lane et al. v. Department of Labor and Industries, *supra.*"

As hereinbefore set out and shown by the record, both of the above questions of law were before this court in Lane et al. v. Department of Labor and Industries, *supra,* and specifically decided therein contrary to the contention of the Gange Lumber Company as there made, and contrary to its contentions on this appeal. As this appeal involves the same parties, the same subject matter, and the same

questions of law as were involved in the Lane case, *supra*, the decision in that case on the legal questions here raised, became the law of this case, and therefore when this cause came before the superior court it was bound by the law of the case as decided on the former appeal, and as no issue of fact was involved, but only the same issues of law as on the former appeal, the trial court had no alternative other than to dismiss this action. Camas v. Kiggins, 120 Wash. 40, 206 Pac. 951; Morehouse v. Everett, 121 Wash. 399, 252 Pac. 157; Epley v. Hunter, 157 Wash. 333, 289 Pac. 27.

In the case last cited, we quoted from 2 R. C. L. p. 223, § 187, as follows:

"It may be stated generally that a court of review is precluded from agitating questions which were propounded, considered, and decided on a previous review; the decisions agree that, as a general rule, when an appellate court passes upon a question and remands the cause for further proceedings, the question there settled becomes the 'law of the case' upon a subsequent appeal; the only mode for reviewing the decision on the prior appeal being by a motion for a rehearing."

No question of fact having been raised on this appeal, the only issues of law raised herein having been decided adversely to appellant's contention on the former appeal, it follows that the trial court correctly dismissed this action, as the trial court was bound by the law of the case as established by this court on the former appeal.

For the reasons herein assigned, the judgment of the trial court is affirmed.

JEFFERS, *J.*

We concur:

BEALS, *C. J.*
STEINERT, *J.*
BLAKE, *J.*
ROBINSON, *J.*
MALLERY, *J.*
GRADY, *J.*

I concur solely on the ground that our opinion or decision in Lane v. Dept. of Labor, *supra*, is the law of the case at bar. I am still of the view that this court grossly erred in its opinion in the Lane case. The constitutional question appellant seeks to raise may be presented in another case in which a different party than in Lane case brings the question here.

MILLARD, *J.*

I concur:

SIMPSON, *J.*

Filed in Clerk's Office. Supreme Court State of Washington. Jan. 27, 1945. Benj. T. Hart, Clerk, by Archie B. Stewart, Deputy.

(7645)

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 20 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 53

GANGE LUMBER COMPANY, *Appellant,*

vs.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Appellees.*

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLANT

JOHN AMBLER,
T. J. HANIFY,
L. B. DONLEY,
WALTER KANE SCOTT,
H. S. MURRAY,
WILLIAM T. LAUBE,
Attorneys for Appellant.

812 Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 53

GANGE LUMBER COMPANY, *Appellant,*

vs.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Appellees.*

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLANT

JOHN AMBLER,
T. J. HANIFY,
L. B. DONLEY,
WALTER KANE SCOTT,
H. S. MURRAY,
WILLIAM T. LAUBE,
Attorneys for Appellant.

812 Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

	Page
I. Opinions Below	1
II. Jurisdiction	2
III. Statement of the Case	3
IV. Industrial Insurance Law Generally	8
V. Specification of Assigned Errors Intended to Be Relied Upon	12
VI. Summary of Argument	14
VII. Argument	15
The 1941 Statute Constitutes a Taking of Property Without Due Process of Law	15
1. The rights of workmen and the liability of employers under the industrial insurance law are purely statutory	15
2. "In the *William Danzer & Co.* case it was held that where a statute in creating a liability also put a period to its existence, a retroactive extension of the period after its expiration amounted to a taking of property without due process of law"	16
a. The inapplicability of *Campbell v. Holt*	22
3. The state's exercise of its police power is subject to the restraints of the Fourteenth Amendment	23
4. The contributions paid by employers into the accident fund are not a license or excise tax	25
5. The majority opinion below considered further	41
Appendix of Statutes	following page 47

TABLE OF CASES

Abraham v. Department of Labor and Industries, 178 Wash. 160, 34 P.(2d) 457	37
Albrecht v. Department of Labor and Industries, 192 Wash. 520, 74 P.(2d) 22	37
American Federation of Labor v. Swing, 312 U.S. 321	25

Page

Arthun v. City of Seattle, 137 Wash. 228, 242 Pac. 16 15
Botica v. Department of Labor and Industries, 184 Wash. 573, 52 P.(2d) 332 6
Butler v. United States, 297 U.S. 1 31
Campbell v. Holt, 115 U.S. 620 ..... 16, 17, 21, 22, 41, 42, 43
Carlson v. Department of Labor and Industries, 200 Wash. 533, 94 P.(2d) 191 37
Carpenter v. Shaw, 280 U.S. 363 45
Central Vermont Railway Company v. White, 238 U.S. 507 18
Chase Securities Corporation v. Donaldson, ... U.S. ....., 89 L. ed. (No. 15) 1109, 1113, decided May 21, 1945 ..... 16, 17, 21, 22
Cole v. Department of Labor and Industries, 200 Wash. 296, 93 P.(2d) 413 ..... 35, 38
Cole v. Department of Labor and Industries (dissenting opinion) 200 Wash. 296, 93 P.(2d) 413 8
Cox v. Department of Labor and Industries, 177 Wash. 529, 32 P.(2d) 570 6
Crew Lavick Co. v. Commonwealth of Pennsylvania, 245 U.S. 292 46
Danzer (William) & Co. v. Gulf & S. I. R. Co., 268 U.S. 633 ..... 16, 20, 21, 22, 25, 41, 42, 46
Davis v. Mills, 194 U.S. 451 ..... 19, 42
Eagles v. General Electric Co., 5 Wn.(2d) 20, 104 P.(2d) 912 20
Earle v. Froedtert Grain & Malting Co., 197 Wash. 341, 85 P.(2d) 462 20
Ek v. Department of Labor and Industries, 181 Wash. 91, 41 P.(2d) 1097 37
Ferguson v. Department of Labor and Industries, 168 Wash. 677, 13 P.(2d) 39 6
Finos v. Netherlands American Mortgage Bank, 147 Wash. 86, 265 Pac. 167 32
Eubanks v. City of Richmond, 226 U.S. 137 24
Foster v. Industrial Insurance Commission, 107 Wash. 400, 181 Pac. 912 33

Page

Foster Fountain Packing Co. v. Haydel, et al., 278 U.S. 1 46
Fullerton-Krueger Lumber Co. v. Northern Pacific R. Co., 266 U.S. 435 19
Gange Lumber Co. v. Rowley and Department of Labor and Industries, 112 Wash. Dec. (No. 8) 234, 155 P.(2d) 802 2
Goldman v. Crowther, 147 Md. 282, 128 Atl. 50 24
Hanover Fire Insurance Co. v. Carr, 272 U.S. 179 46
Harrisburg, The, 119 U.S. 199 17
Herr v. Schwager, 145 Wash. 101, 258 Pac. 1039 20
Hillestad v. Industrial Insurance Commission, 80 Wash. 425, 141 Pac. 913 15
Hoff v. Department of Labor and Industries, 198 Wash. 257, 88 P.(2d) 419 35
Hunter v. Department of Labor and Industries, 190 Wash. 380, 68 P.(2d) 224 6
Kannellos v. Great Northern Railway Co., 151 Minn. 157, 186 N.W. 389 18
Kansas City Southern R. Co. v. Wolf, 261 U.S. 133 19
La Floridienne v. Seaboard Air Line R. Co., 59 Fla. 196, 52 So. 298 19
LeBire v. Department of Labor and Industries, 14 Wn.(2d) 407, 128 P.(2d) 308 37
Lewis v. Missouri Pacific R. Co., 324 Mo. 269, 23 S.W.(2d) 298 19
Link v. Receivers of Seaboard Airline Ry. Co., 73 F.(2d) 149 23
Lukich v. Department of Labor and Industries, 176 Wash. 221, 29 P.(2d) 388 32
Luton v. Department of Labor and Industries, 183 Wash. 105, 48 P.(2d) 199 37
Mattson v. Department of Labor and Industries, 176 Wash. 345, 29 P.(2d) 675, 293 U.S. 151 ..... 44, 45
Monroe Logging Company v. Department of Labor and Industries, 21 Wn.(2d) 800, 153 P.(2d) 511 31

Page

Mountain Timber Co. v. State of Washington, 75 Wash. 581, affirmed, 243 U.S. 219 ..... 25, 26, 32
Morris v. Orcas Lime Co., 185 Wash. 126, 53 P. (2d) 606 (certiorari denied, 299 U.S. 559) 19
Mud Bay Logging Company v. Department of Labor and Industries, 189 Wash. 285, 64 P.(2d) 1054; on rehearing, 193 Wash. 275, 75 P.(2d) 579 ..... 8, 35, 36, 38
Negaubauer v. Great Northern Railway Company, 92 Minn. 184, 99 N.W. 620 18
Panhandle Eastern Pipe Line Company v. State Highway Commission of Kansas, 294 U.S. 613 25
Peeples v. Hayes, 4 Wn.(2d) 253, 104 P.(2d) 305 20
Prince v. Saginaw Logging Company, 197 Wash. 4, 84 P.(2d) 397 37
Purdy & Whitfield v. Department of Labor and Industries, 12 Wn.(2d) 131, 120 P.(2d) 858 15
Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U.S. 389 46
Roellich v. Department of Labor and Industries, 20 Wn.(2d) 674, 148 P.(2d) 957 ..... 30, 35
Ross v. Erickson Construction Co., 89 Wash. 634, 155 Pac. 153 32
Rowley v. Dept. of Labor and Industries, 21 Wn. (2d) 420, 151 P.(2d) 440 ..... 7, 8
St. Paul & Tacoma Lumber Company v. Department of Labor and Industries, 19 Wn.(2d) 639,
Schaefer Bros. Logging Co. v. Department of Labor and Industries, 4 Wn.(2d) 720, 104 P. (2d) 747 8
Schmeiling v. Department of Labor and Industries, 167 Wash. 692, 10 P.(2d) 229 6
144 P.(2d) 250 ..... 27, 30, 35, 38
Shea v. Olson, 185 Wash. 143, 53 P.(2d) 615 23
State v. Bank of California, N.A., 187 Wash. 153, 59 P.(2d) 1128 39
State v. Postal Tel. Cable Co., 101 Wash. 630, 172 Pac. 902 ..... 32, 33
State v. Vinther, 176 Wash. 391, 29 P.(2d) 693 ..... 27, 32

Page

State ex rel. Crabb v. Olinger, 191 Wash. 534, 71 P.(2d) 545 35
State ex rel. Crabb v. Olinger, 196 Wash. 308, 82 P.(2d) 865 ..... 26, 27, 30
State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101 ..... 23, 25, 26, 27, 32
State ex rel. Pratt v. Seattle, 73 Wash. 396, 132 Pac. 45 32
State of Washington ex rel. Seattle Title Trust Company, 278 U.S. 116 24
State ex rel. Trenholm v. Yelle, 174 Wash. 547, 25 P.(2d) 569 34
Stertz v. Industrial Insurance Commission, 91 Wash. 588, 158 Pac. 256 33
Storaasli v. State of Minnesota, 283 U.S. 57 45
Truax v. Corrigan, 257 U.S. 312 46
Wynand v. Department of Labor and Industries, 21 Wn.(2d) 805, 153 P.(2d) 302 6

TEXTBOOKS

1 Wood on Limitations (4th ed.) 41, §9 19

STATUTES

Laws of Washington 1911, Ch. 74 8
Ch. 74, §4 ..... 4, 9, 26
Ch. 74, §5 8
Laws of Washington 1927, Ch. 310, §4 4
Laws of Washington 1929, Ch. 132, §2 4
Laws of Washington 1941, Ch. 209 ..... 12, 13
Ch. 209, §1 ..... 5, 12
Laws of Washington 1945, Ch. 8, p. 27 10
Remington's Revised Statutes of Washington:
§5341 5
§7673 ..... 8, 15, 32, 33 and Appendix 1
§7679 ..... 4, 8-9, 10 and Appendix 10
§7679(h) 3
§7696 ..... 39 and Appendix 12
§7708 10
§7713 10

Page

Remington's Revised Statutes of Washington, Supplement:
§7674 ..... Appendix 2
§7676 ..... 8, 9, 10, 34 and Appendix 2
§7697-2 ..... 33 and Appendix 17
§8370-1, *et seq.* 39
§8370-36 39
Remington's Revised Statutes of Washington, 1941 Permanent Supplement, §7679 ..... 5, 10
1943 Permanent Supplement, §7697 ..... 11 and Appendix 13
§8370-4 39
26 U.S.C.A. §§3 4a, 861a, 861b 2

CONSTITUTIONS

Washington State Constitution, 7th Amendment 5
United States Constitution:
5th Amendment 25
14th Amendment 7, 12, 14, 16

COURT RULES

Rules of United States Supreme Court, Rule 12 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 53

GANGE LUMBER COMPANY, *Appellant*,

vs.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Appellees*.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLANT

This is an appeal from a judgment of the Supreme Court of the State of Washington, entered on February 19, 1945, affirming a judgment of the Superior Court of the State of Washington which in turn affirmed a decision of the Appellee Department of Labor and Industries of the State of Washington.

I.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington, upon which was entered the judgment from which this appeal is taken, is reported in 21 Wn. (2d) 420, 151 P.(2d) 440. The opinion of the same court, which was rendered in this case upon the first appeal in the cause to said court, and in which the

grounds of the court's ultimate decision are more fully set forth, is reported in 112 Wash. Dec. (No. 8) 234, 155 P.(2d) 802.

II.

JURISDICTION

The jurisdiction of this court is invoked under Section 237a of the United States Judicial Code, as amended by Acts of February 13, 1925, January 31, 1928 and April 26, 1928 (Title 26 U.S.C.A., Sections 344a, 861a and 861b). The judgment from which this appeal is taken is a final one in the highest court of the State of Washington. The judgment drew in question the validity of a statute of said state on the ground of its being repugnant to the Constitution of the United States, the decision being in favor of the validity of the statute.

The petition for appeal was presented on February 28, 1945. This court noted probable jurisdiction on May 28, 1945.

The specific grounds upon which the jurisdiction of this court is invoked are given in appellant's Statement as to Jurisdiction previously filed herein pursuant to Rule 12 of the Rules of this court. Reference is hereby made to said document for a more complete statement as to the court's jurisdiction.

III.

STATEMENT OF THE CASE

The facts are undisputed. The appellee Ralph Rowley suffered an injury to his right hand on July 13, 1937, while engaged in extra-hazardous employment as a resawyer in the sawmill of appellant Gange Lumber Company, a Washington corporation, in Tacoma, Washington. On account of this injury, the appellee Rowley filed a report of accident and claim for compensation with the appellee Department of Labor and Industries of the State of Washington under the Industrial Insurance Law, or Workmen's Compensation Act, of said State (R. 2). The claim was allowed and lump sum awards totalling $307.50 were paid to Rowley on account of the permanent partial disability suffered by him, the claim being finally adjudicated and closed by order of the appellee Department of Labor and Industries dated March 9, 1938, from which no appeal was taken (R. 3, 4).

The law of the State of Washington in effect at the time of the appellee Rowley's injury, and at all times thereafter until December 3, 1942, provided that a workman whose disability should become aggravated after his claim was closed might apply to the appellee Department, at any time within three years after closure but not thereafter, for reopening of the claim and for additional compensation on account of the aggravation of disability. The applicable statute, codified as Remington's Revised Statutes of Washington, 1932, Section 7679(h), read as follows:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered

after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminte the payment: Provided, Any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment." (Laws of Washington, 1911, Chapter 74, Section 4, as amended by Laws of Washington, 1927, Chapter 310, Section 4, and Laws of Washington, 1929, Chapter 132, Section 2)

Section 7679 of Remington's Revised Statutes sets forth the "Compensation Schedule" pursuant to which lump sum awards are allowed by the Appellee Department to injured workmen on account of permanent partial disabilities suffered by them, as well as monthly compensation to workmen totally and permanently, or totally but temporarily disabled, and to the widows and surviving dependents of deceased workmen, subsection (h) quoted above being a part of the compensation section of the Act.

In 1941, the legislature of the State of Washington enacted a statute, amending Section 7679, for the purpose of increasing generally the wide variety of benefits allowable under the Workmen's Compensa-

tion Act (Laws of Washington, 1941, Chapter 209, Section 1; Remington's Revised Statutes of Washington, 1941 Permanent Supplement, Section 7679). By this Act, subsection (h) quoted above was amended to read as follows, the only changes being indicated by the italicized words:

> "(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the Director of Labor and Industries, through and by means of the Division of Industrial Insurance, may, upon the application of the beneficiary, made within *five* years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminated the payment: Provided, Any such applicant whose compensation has heretofore been established or terminated shall have *five* (*5*) years from the taking effect of this act within which to apply for such readjustment."

The 1941 Act, as enacted by the legislature, was subjected, however, to the referendum procedure provided for by the Constitution and statutes of the State of Washington and did not become effective until December 3, 1942, following approval of the act by the voters of the state at the general election held on November 3, 1942, and the proclamation of the governor of the state to that effect (Constitution of the State of Washington, Amendment 7; Remington's Revised Statutes of Washington, Section 5341; and

see *Wynand v. Department of Labor and Industries*, 21 Wn.(2d) 805, 153 P.(2d) 302).

At no time within three years after closure of his claim did the appellee Rowley apply for reopening and additional compensation, and his right so to apply became forever barred. This, of course, was recognized not only by the decision below, but had been repeatedly so held, under similar circumstances, by the Supreme Court of Washington:

Schmeiling v. Department of Labor and Industries, 167 Wash. 692, 10 P.(2d) 229;

Ferguson v. Department of Labor and Industries, 168 Wash. 677, 13 P.(2d) 39;

Cox v. Department of Labor and Industries, 177 Wash. 529, 32 P.(2d) 570;

Botica v. Department of Labor and Industries, 184 Wash. 573, 52 P.(2d) 332;

Hunter v. Department of Labor and Industries, 190 Wash. 380, 68 P.(2d) 224.

After the 1941 Act became effective, and on March 19, 1943, more than five years after the claim was closed, the appellee Rowley filed his application for reopening of his claim and for additional compensation on the ground of an alleged aggravation of his disability occurring after March 9, 1938, the date of final closing of his claim (R. 5). This application was rejected by the appellee Department of Labor and Industries through the Supervisor of Industrial Insurance, on the ground that the appellee Rowley's right so to apply had become barred under the law *in effect at the time of his injury* and at the time of

the closing of his claim (R. 7). This rejection was affirmed upon appeal by the Joint Board of the appellee Department (R. 9) and by the Superior Court of the State of Washington for Pierce County (R. 13), but was reversed by the Supreme Court of the State of Washington. The latter court held, 21 Wn.(2d) 420, 151 P.(2d) 440, that the 1941 Act was to be interpreted as applying retroactively to permit the reopening of the appellee Rowley's claim and an award of additional compensation to him *notwithstanding* that his right to apply therefor *had become barred* under the earlier law, prior to the effective date of the *new* law, and the court held further that the 1941 Act, as so interpreted, did not violate the 14th Amendment to the Constitution of the United States in its application to the appellee Gange Lumber Company.

Pursuant to a Judgment of the Supreme Court of the State of Washington (R. 20), the cause was remanded to the appellee Department (R. 21) where an investigation of the appellee Rowley's disability was had (R. 24) and pursuant thereto additional compensation in the amount of $460.50 was ordered paid to Rowley on account of the aggravation of disability which he claimed (R. 27), this order being affirmed upon appeal by the Superior Court for Pierce County and the Supreme Court of the State of Washington (R. 38, 44). The amount of the additional award is chargeable to the appellant Gange Lumber Company's cost experience under the Industrial Insurance Law and the award will be paid in large measure by the appellant:

Remington's Revised Statutes of Washington, Supp., Section 7676, page 251;

Majority and dissenting opinions below, 21 Wn.(2d) 420, at pp. 428 and 446, 151 P. (2d) 440, at pp. 444 and 453;

Mud Bay Logging Co. v. Department of Labor and Industries, 189 Wash. 285, 6 P.(2d) 1054, 193 Wash. 275, 75 P.(2d) 579;

Cole v. Department of Labor and Industries (dissenting opinion), 200 Wash. 296, 93 P. (2d) 413;

Schaefer Bros. Logging Co. v. Department of Labor and Industries, 4 Wn.(2d) 720, 104 P.(2d) 747.

IV.

INDUSTRIAL INSURANCE LAW GENERALLY

The Workmen's Compensation Act was originally adopted as Laws of Washington, 1911, Chapter 74, and has been the subject of amendment many times since.

Section 1 of the Act, now Remington's Revised Statutes, Section 7673, contains a declaration that the common law system governing the remedy of injured workmen against employers is inadequate, because of the inevitability of accidents in industry for which workmen had no redress against their employers. Section 1, therefore, in the exercise of the state's police and sovereign powers, ablished all common law causes of actions in favor of workmen against employers, and the Act, by Section 5 (Remington's Revised Statutes,

Section 7679) substituted for the workmen the right to compensation, "regardless of questions of fault" on his part or on the part of his employer, out of a fund to be maintained by the appellee Department.

This fund, known as the accident fund, is provided for by section 4 of the Act, now (and since Rowley's injury) Remington's Revised Statutes, Supplement, Section 7676. It is supported by contributions paid into the State Treasury by employers engaged in extrahazardous industry for the exclusive account of the accident fund.

Section 7676 divides such industry into 91 classes and sub-classes, covering a great variety of businesses, basic premium rates for employers in the various classes and sub-classes based upon the risk therein. These rates are subject to revision and change from time to time by the Director of the appellee Department, at his discretion and as he may determine the condition of the accident fund requires.

Section 7676 provides also that, in determining the actual premium rate applicable to each employer, the Department shall take into consideration "the average cost experience of each employer for each workman hour reported by him during each fiscal year in each such class or sub-class over the five-year period immediately preceding September first of the year in which the rate is being determined," and Section 7676 then provides that "The actual premium rate which any employer shall be required to pay for the accident fund shall be forty per cent (40%) of the basic rate, plus sixty per cent (60%) of the em-

ployer's cost rate for each workman hour reported by him during each fiscal year over the five-year period next preceding the then last September first, but in no case shall the total rate exceed one hundred sixty per cent (160%) of the basic rate." The legislative policy of the state is stated by Section 7676 to be that "It is the intent that the accident fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration" which is appropriated biannually by the legislature out of the general funds of the state (Remington's Revised Statutes of Washington, Section 7708; Laws of Washington, 1945, Chapter 8, page 27).

A second fund, the operation of which is not involved in the case at bar, is known as the medical aid fund out of which the cost of the care and treatment of injured workmen is paid. The amount of contributions to this fund is also determined in accordance with the individual employer's cost experience but such contributions are paid one-half by the employer and one-half by his workmen. Remington's Revised Statutes, Section 7713 and Supplement, Section 7676.

Section 5 of the Act contains the schedule of awards or "Compensation Schedule" (Remington's Revised Statutes of Washington, Section 7679 at time of Rowley's injury; now 1941 Permanent Supplement, Section 7679). A lump sum award in a stated amount, payable out of the accident fund, is provided for with respect to each of many specified disabilities involving

amputations of portions of the body or other stated losses, and compensation for any other permanent partial disability is payable "in the proportion which the extent (it) shall bear to" that one of the specified disabilities which it most closely resembles. Monthly awards, commonly called pensions, are provided for in the cases of permanent total disability and, for widows and dependents, in the cases of death of workmen.

Section 20 of the Act provides for the procedure in connection with the allowance, or rejection of a claim for compensation (Remington's Revised Statutes of Washington, 1943 Permanent Supplement, Section 7697). Section 7697 provides for the filing of a report of accident and claim for compensation with the appellee Department of Labor and Industries. The claim, on behalf of the Department, is first considered and allowed with an award, or is rejected by the Supervisor of Industrial Insurance, one of the Department officials. Either the claimant or his employer, if dissatisfied with the action of the Supervisor, may petition for a rehearing before Joint Board of the Department, which consists of the Director of the Department, the Supervisor of Industrial Insurance and the Supervisor of Safety of the state. If a rehearing is granted, testimony may be offered and received on behalf of the claimant, the department and the employer and, upon the conclusion of the hearing, the Joint Board is required to render its decision by an order entered in the proceeding. Either the claimant or employer, if dissatisfied with such order, may appeal therefrom to the Superior Court of the State of

Washington where the cause is triable *de novo*, but upon the record made before the Joint Board, the claimant, the department and the employer may each appear and participate as a party upon such appeal, and an appeal then lies from the judgment of the Superior Court, as in other civil cases, to the Supreme Court of the State.

V.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE RELIED UPON

1. The Supreme Court of the State of Washington, by its judgment, erred in holding that Laws of Washington, 1941, Chapter 209, Section 1, insofar as said statute revives appellee's right to apply for reopening of his industrial insurance claim, notwithstanding that said right had become *barred* and had *expired prior* to the *effecti[illegible] date of said statute*, does not deprive appellant of its property without due process of law * * * in violation of the Fourteenth Amendment to the Constitution of the United States of America, and said court erred in failing to hold that said statute does so deprive appellant of its property * * *.

2. The Supreme Court of the State of Washington by its judgment erred in holding that the removal by said Laws of Washington, 1941, Chapter 209, Section 1, of the bar of limitations to the reopening of Appellee Rowley's said claim affected *only* said appellee's *remedies* under the Workmen's Compensation Act of said State and did *not* affect the *substantial*

rights of appellant, and said court erred in failing to hold that said removal did affect appellant's substantial rights.

3. The Supreme Court of the State of Washington by its judgment erred in holding that a statute, purportedly enacted in the exercise of a state's police power, viz., Laws of Washington, 1941, Chapter 209, is not subject or subservient to the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of the State of Washington by its judgment erred in holding that the contributions or premiums exacted of an employer by the Workmen's Compensation Act of the State of Washington and paid by the employer into the accident fund maintained by the appellee Department of Labor and Industries of said State are a license or excise tax.

5. The Supreme Court of the State of Washington by its judgment erred in affirming the judgment of the Superior Court of the State of Washington for Pierce County, dismissing appellant's appeal from the order of the appellee Department of Labor and Industries of said State allowing additional compensation to the appellee Rowley under said Laws of Washington, 1941, Chapter 209.

6. The Supreme Court of the State of Washington by its judgment erred in failing to reverse said judgment of the Superior Court for Pierce County and in failing to render judgment dismissing the appellee Rowley's application for reopening of his claim and for additional compensation.

VI.

SUMMARY OF ARGUMENT

The 1941 statute constitutes a taking of appellant's property without due process of law.

When a statute, in creating a right and liability, also puts a period to the existence thereof, a retroaction extension of the period after its termination amounts to the taking of the property of one injured thereby without due process of law.

The Industrial Insurance Law is such a statute and under it, the appellant's substantial rights and liabilities, not a mere remedy of the appellee Rowley, are affected.

The challenged statute is an exercise of the police power of the State of Washington, and the exercise of such power by the legislature, far from being unfettered as said by the Supreme Court of the state, is subject to the restraints of the Fourteenth Amendment.

The Industrial Insurance Law of the State of Washington is not a taxing statute but is an industrial insurance measure under which many new rights, liabilities and immunities are created in favor of both employe and employer. The premiums paid into the Accident Fund by employers are not taxes but are a trust fund held by the appellee Department exclusively for the purposes specified in the Act.

VII.

ARGUMENT

The 1941 Statute Constitutes a Taking of Property Without Due Process of Law

1. The rights of workmen and the liability of employers under the industrial insurance law are purely statutory.

Section 1 of the Act, Remington's Revised Statutes, Section 7673, after reciting that "The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions," provided that "all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished * * *."

The Act provided for the payment out of the accident fund of compensation to injured workmen, where such right did not exist at common law; it required contributions from employers for the support of the fund, an obligation unknown to the common law; and it created many other rights and responsibilities in a system of industrial insurance unknown to the common law. As is obvious, the Supreme Court of Washington has frequently recognized all rights and liabilities under the Act as being purely statutory:

Hillestad v. Industrial Insurance Commission, 80 Wash. 425, 141 Pac. 913;

Arthun v. City of Seattle, 137 Wash. 228, 242 Pac. 16;

Purdy & Whitfield v. Department of Labor and Industries, 12 Wn. (2d) 131, 120 P. (2d) 858.

2. "In the *William Danzer & Co.* case it was held that where a statute in creating a liability also put a period to its existence, a retroactive extension of the period after its expiration amounted to a taking of property without due process of law."

This heading is a quotation from the court's opinion in the recent case of *Chase Securities Corporation v. Donaldson*, ... U.S. ....., 89 L. ed. (No. 15) 1109, 1113, decided May 21, 1945, wherein the court approved the doctrine of *Campbell v. Holt*, 115 U.S. 620, but carefully distinguished the *Danzer* case (*William Danzer & Co. v. Gulf & S. I. R. Co.*, 268 U.S. 633).

In *Campbell v. Holt*, the adoption of the Constitution of Texas in effect repealed a general statute of limitations under which the plaintiff's right at common law to the recovery of money damages for breach of contract had become barred. The court, in applying the familiar doctrine that an ordinary statute of limitations *merely bars* the *remedy* and does not destroy the right, held that the 14th Amendment did not prohibit the restoration of the plaintiff's remedy.

In the *Danzer* case, it appeared that the statutory right of the shipper-plaintiff for recovery under the Interstate Commerce Act, on account of a misrouting of his shipment by the defendant railroad, had become barred under the limitation period prescribed by the Interstate Commerce Act for assertion of the right so created. Subsequently Congress passed the Transportation Act of 1920, section 206 (f) of which provided that the period of federal control of the railroads during the First World War should not be computed as a part of the two-year period. If the period

of control were to be excluded, the plaintiff's complaint was filed within time. It was held, however, as stated in the *Chase Securities Corporation v. Donaldson* opinion, that a retroactive revival of plaintiff's right to sue would constitute a denial of due process. In speaking of *Campbell v. Holt*, the court said:

> "That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act (authority cited), and those arising under the Federal Employers' Liability Act (cases noted). This case belongs to the latter class. * * *"

In *The Harrisburg*, 119 U.S. 199, 214, the court said:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year; and it would seem clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent

parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. *The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.*" (Emphasis supplied.)

In *Central Vermont Railway Company v. White*, 238 U.S. 507, 511, the court said:

"There can, of course, be no doubt of the general principle that matters respecting the remedy —such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought (*M'Niel v. Holbrook*, 12 Pet. 89). *But matters of substance and procedure must not be confounded because they happen to have the same name.* For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy, but destroys the liability. (Cases cited.) In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a state which gave a longer period within which to sue. * * *" (Emphasis supplied.)

In *Kannellos v. Great Northern Railway Co.*, 151 Minn. 157, 186 N.W. 389, 390, citing *Negaubauer v. Great Northern Railway Company*, 92 Minn. 184, 99 N.W. 620, with approval, the court said:

"The rule controlling the question—the rule followed and applied by the courts generally—is

as stated in the (*Negaubauer*) case just cited, and to the effect that, where a statute gives a new right of action, not existing at common law, and prescribes the time within which it may be enforced, the time so prescribed is a condition to its enforcement, an element in the right itself, and the right falls with the failure to apply for relief within the allotted time. The rule as stated is one of general application and is distinguished from the rule applied to statutes limiting the remedy, and not the right."

See also:

Fullerton-Krueger Lumber Co. v. Northern Pacific R. Co., 266 U.S. 435;

Kansas City Southern R. Co. v. Wolf, 261 U.S. 133;

Davis v. Mills, 194 U.S. 451;

La Floridienne v. Seaboard Air Line R. Co., 59 Fla. 196, 52 So. 298;

Lewis v. Missouri Pacific R. Co., 324 Mo. 269, 23 S.W.(2d) 298;

1 Wood on Limitations (4th ed.), page 41, Section 9.

The Supreme Court of Washington has also repeatedly observed the same distinction. In *Morris v. Orcas Lime Co.*, 185 Wash. 126, 130, 53 P.(2d) 606 (certiorari denied, 299 U.S. 559), the court said:

"The statute defining and allowing recovery for a preference creates a statutory, legal liability, subject to the limitation that a suit to enforce it must be commenced within six months from the time of filing the application for the appointment of a trustee, etc. The limitation is

not one that goes to the remedy of a defendant, like the ordinary statute of limitation, but it goes to the cause of action or right to sue. The time prescribed—six months from the time of filing the application for the appointment of the trustee—for the commencement of the action is a condition to the enforcement of the liability or the trustee's right of recovery, an element in the right itself. The right falls with the failure to commence the action within the time allotted."

See also

Earle v. Froedtert Grain & Malting Co., 197 Wash. 341, 85 P.(2d) 462;

Peeples v. Hayes, 4 Wn.(2d) 253, 104 P. (2d) 305;

and *Eagles v. General Electric Co.*, 5 Wn.(2d) 20, 33, 104 P.(2d) 912, 917, where the court said:

"* * * However, * * * the so-called limitation pleaded in that case was the six months' limitation with respect to actions brought by receivers to recover unlawful preferences * * * which is not in a true sense a statute of limitations at all * * *."

The *Danzer* case was passed upon, so far as we can determine, only once by the Supreme Court of Washington prior to the case at bar. In *Herr v. Schwager*, 145 Wash. 101, 258 Pac. 1039, the *Danzer* case, although it was not mentioned by name in the opinion, had been relied upon by the appellants in their brief. They contended that the liability upon which the action had been commenced against them was a liability created by statute. The right to sue had once become barred prior to the enactment of an amendatory statute expressly extending the time for commence-

ment of their action. The court, in following *Campbell v. Holt*, said:

> "It is argued that the case of *Campbell v. Holt*, supra, is not applicable to the present case for the reason that the liability, if any, on the part of the appellants is statutory. The answer to this is that the liability of one diverting the assets of an insolvent corporation to the prejudice of the rights of a creditor exists at common law."

The distinction between *Campbell v. Holt* and the *Danzer* decision is studiously observed in the opinion in *Chase Securities Corporation v. Donaldson*. In the latter case the appellant had relied upon the *Danzer* case, contending that the suit brought against it was found upon a liability created by the statutes of Minnesota. The court approved the doctrine of *Campbell v. Holt*, notwithstanding its criticism in legal literature and by many courts. But the court said in their opinion:

> "The (Minnesota) Blue Sky Law imposes duties upon a seller of certain securities, but it does not expressly *define a liability* for their omission or *create a cause of action* in favor of a buyer of unregistered securities. The state courts, nevertheless, held that such an illegal sale will support *a common-law action in tort*." (Emphasis supplied.)

And the court said also:

> "It is not uncommon that a single cause of action in tort will rest both on omission of a statutory duty and on common-law negligence; the two bases do not necessarily multiply the causes of action. (Authority cited.) This appears to be permitted by the law of Minnesota."

And further:

> "No separate statement of *a statutory cause of* action is set out in the complaint in this case. * * * The state courts seem to have treated the complaint as setting up several bases for a single *common-law cause of action* in tort which had been remanded for trial at the time the new statute was enacted. We must regard it in the same light." (Italics ours)

Then, in expressly distinguishing the *Danzer* case, the court said:

> "At the time this action was commenced the Blue Sky Law of Minnesota had imposed on appellant a duty; *it had not explicitly created a liability.* The liability was implied *by the state's common law;* the period of limitation was found only in *the general statute of limitations* enacted many years earlier. The state court concluded that the challenged statute did not confer upon appellees *a new right* or subject appellants to *a liability.* * * *" (Emphasis ours)

a. The inapplicability of Campbell v. Holt

It is perfectly plain that the Workmen's Compensation Act of the State of Washington did create a new right in the appellee and did impose a new liability upon the appellant. The general statute of limitations of the State of Washington, applying to all manner of common law causes of action, has no application here, nor has it ever been contended to have any application. The reason for the rule in *Campbell v. Holt* has no application here. The *Danzer* case is squarely applicable, for the Industrial Insurance Law, in creating the right of Rowley and the accompanying

liability of the appellant, put a limitation upon the existence of both thereof, and the purported retroactive extension of the period after its expiration amounts to a taking of the appellant's property without due process of law. *Link v. Receivers of Seaboard Airline Ry. Co.*, 73 F.(2d) 149, follows the *Danzer* case and is squarely in point here.

3. The state's exercise of its police power is subject to the restraints of the Fourteenth Amendment.

In avoidance of the *Danzer* case, the majority opinion of the Supreme Court of Washington in the case at bar states, quoting with approval from *Shea v. Olson*, 185 Wash. 143, 53 P.(2d) 615:

> " 'We next consider the provisions of Art. I, §§ 3 and 12 of the state constitution and the fourteenth amendment of the United States constitution, relating to due process and the equal protection of the laws.
>
> "*None of these constitutional provisions apply to laws enacted by a state legislature in the exercise of its police power.* We have repeatedly so held. (Citing authorities.)' " (Emphasis supplied)

The Workmen's Compensation Act was originally sustained as a valid exercise of the state's police power, *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, and that view has persisted down through the case at bar. Presumably the 1941 amendment was a further exercise of the police power. But every such exercise must be reasonable and otherwise legitimate, for as said by the Supreme Court of Maryland,

> "While it is difficult if not impossible to define

precisely the limits of the police power, there must in the very nature of things be some limit to it, for otherwise the guaranties of written constitutions would be little more than mere precatory and directory suggestions without force or affording to the citizen only a false and illusory protection against the invasion of his rights by the State; and his security would not depend upon constitutional guaranties but upon the will of the State in exercising an unlimited police power."

Goldman v. Crowther, 147 Md. 282, 128 Atl. 50, 54.

In *Eubanks v. City of Richmond*, 226 U.S. 137, 142, the Court said, in holding a city ordinance to be an invalid exercise of the police power:

"Whether (a statute) is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or general prosperity. * * * But necessarily it has its limits and must stop when it encounters the prohibitions of the Constitution."

In *State of Washington ex rel. Seattle Title Trust Company*, 278 U.S. 116, 121, it was said that

"Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of lawful activities." (Citing many cases)

And in *Panhandle Eastern Pipe Line Company v. State Highway Commission of Kansas*, 294 U.S. 613, 619:

> "A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions." (Citing cases)

And in *American Federation of Labor v. Swing*, 312 U.S. 321, 325:

> "* * * That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. * * *"

The exercise by a state of its police power is subservient to the Fourteenth Amendment, and it was held in the *Danzer* case that an exercise of power indistinguishable from the 1941 Act in question was in violation of the due process clause of the Fifth Amendment.

4. The contributions paid by employers into the accident fund are not a license or excise tax.

In further avoidance of the *Danzer* decision, the majority opinion in the case at bar refers to the employer's contributions as a license tax *for the privilege of carrying on business*, saying that this view of the law was initiated in *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, and ap-

proved in *Mountain Timber Company v. State of Washington*, 243 U.S. 219, and the majority opinion cites also *State v. Vinther*, 176 Wash. 391, 29 P.(2d) 693, and *State ex rel. Crabb v. Olinger*, 196 Wash. 308, 82 P.(2d) 865, as further authority.

In the *Davis-Smith Co.* case, the Washington Supreme Court, while primarily sustaining the Act as an exercise of the state's police power, did refer to the employer's contributions as partaking of the nature of a license tax and said that "for many purposes (they) might be so spoken of without harm." It should be remembered, however, that this language of the court was prompted by the attack made in the case upon the constitutionality of the Act, that is, that these contributions constituted a property tax and that, being such, the Act violated the provisions of the state constitution requiring equal and uniform taxation of property for public purposes. It should be remembered also that the Washington Supreme Court has said repeatedly since (see the cases noted below) that the Act is an exercise of the police power, and also that when these remarks were made in the *Davis-Smith Co.* case, the employer's contributions were *not* determinable upon a *cost experience* basis. Laws of Washington, 1911, Chapter 74, Section 4.

It should be noted also that the view of the majority opinion was not approved by this Court in the *Mountain Timber Company* case but rather that the Court, speaking through Mr. Justice Pinckney, very carefully reserved the point, holding that the Act, under all the circumstances, constituted a valid exercise of the state's legislative power.

The remark of the court in *State v. Vinther*, referred to in the majority opinion, is pure dictum, wholly unnecessary to the decision in the case, and it must be observed that *State ex rel. Crabb v. Olinger*, referred to in the majority opinion as authority, had been considered at length and expressly overruled in *St. Paul & Tacoma Lumber Company v. Department of Labor and Industries*, 19 Wn.(2d) 639, 144 P.(2d) 250.

All of this is preparatory to the remark that, except in *State ex rel. Crabb v. Olinger*, since overruled, it has *never been held* by the Washington Supreme Court, in the case at bar or any other case where a decision on the point was necessary to a disposition of the case, that the employer's contributions constitute a license tax. The stray remarks in the cases are due to the court's reference in the *Davis-Smith Co.* case to the contributions partaking of the nature of a license tax. This is probably best indicated by the court's opinion in *State ex rel. Crabb v. Olinger* where Justice Millard's majority opinion referred to the contributions as a license tax. In a dissenting opinion, which later became the view of the majority of the court when the case was overruled, Justice Simpson, one of the dissenting judges, said (196 Wash. 308, 333, 82 P.(2d) 865, 876):

> "The majority holds that the contributions paid under the workmen's compensation act is a license tax, citing *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L.R.A. (N.S.) 466. It is true that reference was made to that question in *Mountain Timber Co. v. Washington*, 243 U.S. 219 * * * citing the *Clausen*

case, *supra*. It will be observed, however, that, in that case, the court did not hold the charge laid upon persons engaged in industries either named in the act or that could be brought under the act, constituted a license tax, but rather that it partakes of the nature of a license tax.

"A tax is defined in 26 R.C.L. 13, to be:

"'* * * an enforced contribution of money or other property, assesed in accordance with some reasonable rule of apportionment by authority of a sovereign state on persons or property within its jurisdiction, for the purpose of defraying the public expenses.'

"The definition of a license tax is contained in 17 R.C.L. 475, as follows:

"'A license tax is one imposed on the privilege of exercising certain callings, professions, or vocations, that, when collected, goes into the public treasury, and, when applied to municipal taxation, is termed "a license fee".'

"The amounts collected by the department pursuant to the provisions of the workmen's compensation act are not taxes, and we have not so held. Such sums are merely sums of money collected by a governmental agency and paid into a trust fund for the sole benefit of those injured workmen falling within the act. The assessments made have none of the characteristics of a license tax. * * *

"The state compels payments by virtue of the exercise of the police power to regulate industry as distinguished from the exercise of the taxing power. The sums paid by the employers are not paid into the treasury for the benefit of the state government as such."

Justice Steinert wrote a concurring dissent:

"* * * they are contributions required of and paid by those engaged in extrahazardous industries to meet the burden resting upon them of carrying the greater part of the cost of accidents occurring in such industries; and, when so paid, these contributions constitute trust funds to be devoted to the purposes specified by the workmen's compensation act. The distinction between these two concepts is very important.

"If these contributions be considered merely as 'license taxes,' then, obviously, the employer is concerned only with the payment of his 'tax' in order to engage in business, and he is in no way concerned with the manner in which such 'taxes' are disposed of or distributed by the department among injured employees. The only questions that the employer could raise, under that theory, would be whether the tax was reasonable. But the workmen's compensation act by its terms discloses beyond any question of doubt that the employer has a very vital interest in the administration of the accident fund, and that he has the right to be heard before the department and in court upon every claim made by a workman. The employer is not a mere licensee under the act; he is in the position of an assured who, for the premiums that he pays, is entitled to have every just claim arising under the act compensated out of the fund and every spurious claim rejected.

"I emphasize this phase of the case because the theory of Judge Millard's opinion is that, since the employer's connection with the workmen's compensation act is *merely by virtue of a taxing process*, he therefore does not have an appeal to

> the courts as a matter of right, but only as a matter of grace; and that, since under the language of the statute the appeal granted to the employer does not operate as a stay, therefore the compensation awarded by the joint board must be paid without regard to the question whether the appeal of the employer may be successful. With that reasoning I cannot agree." (Emphasis ours)

It was said in *Roellich v. Department of Labor and Industries*, 20 Wn.(2d) 674, 148 P.(2d) 957:

> "The respondent has moved to dismiss the appeal of the Weyerhaeuser Timber Company on the ground that an employer has no right of appeal * * *.
>
> "This court has so repeatedly held, that, under similar circumstances, an employer has the right to appeal, that we feel warranted in denying the first motion without citation of authority."

The dissenting opinions in *State ex rel. Crabb v. Olinger* are important, of course, not only because they appear in the overruled case which is cited as authority in the majority opinion in the case at bar, but also because they became the view of the majority of the court when the *Crabb* case was expressly overruled in the *St. Paul & Tacoma Lumber Company* case. It is interesting to note, also, that in the latter case, Justice Millard again wrote the majority opinion, stating in unequivocal terms, as he did in his dissenting opinion in the case at bar, that the employer's contributions do not constitute a license tax, thus recognizing the error in his original view of the *Crabb* case.

The view of the majority of the Washington Supreme Court was brought into line, therefore, with the view of this court expressed, upon similar circumstances, in *Butler v. United States*, 297 U. S. 1:

> "* * * A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. * * *
>
> "We conclude that the act is one regulating agricultural production; that the tax is a mere incident of such regulation and that the respondents have standing to challenge the legality of the exaction."

It should be observed also that this point showed up again after the case at bar in *Monroe Logging Company v. Department of Labor and Industries*, 21 Wn.(2d) 800, 153 P.(2d) 311, in which only three judges signed the majority opinion, the remaining two, among whom one was with the majority in the case at bar, merely concurring in the result, and, we have no doubt, because of the language in the opinion concerning a "license tax."

It is true that this point was given only passing importance in the majority opinion and, we make bold to say, is only makeweight therein. That it is in error, however, is evident, not only from what has already been said, but also from the purpose, history and operation of the Act itself, particularly as interpreted and applied by the Washington Supreme Court.

In enacting the Act, the legislature stated themselves that they did so under the state's "police and sovereign power," Remington's Revised Statutes of Washington, Section 7673, *not the taxing power.*

The act was originally sustained as a valid exercise of the police power, *State ex rel. Davis-Smith Co. v. Clausen, supra,* 65 Wash. 156, 117 Pac. 1101, and the view that the Act is an exercise of such power has been recognized in many later cases, including the case at bar:

Mountain Timber Co. v. State of Washington, 75 Wash. 581, affirmed, 243 U.S. 219;

State ex rel. Pratt v. Seattle, 73 Wash. 396, 132 Pac. 45;

Ross v. Erickson Construction Co., 89 Wash. 634, 155 Pac. 153;

State v. Postal Tel. Cable Co., 101 Wash. 630, 172 Pac. 902;

Finos v. Netherlands American Mortgage Bank, 147 Wash. 86, 265 Pac. 167;

Lukich v. Department of Labor and Industries, 176 Wash. 221, 29 P.(2d) 388;

State v. Vinther, 176 Wash. 391, 29 P.(2d) 693.

The Act "came of a great compromise between employers and employed" under which the employer, in exchange for limited liability, was willing to pay on some claims in the future where in the past there had been no liability at all, and the employee was willing to give up trial by jury (which has since been restored upon appeals to the Superior Court, Remington's Revised Statutes of Washington, Supplement, Section 7697-2), and to accept a certain award, though far less than he had often won in court. *Stertz v. Industrial Insurance Commission*, 91 Wash. 588, 158 Pac. 256.

The Act, having grown out of a compromise, is for the benefit of the employer as well as the employee, in that the former's liability at common law for negligent injuries to his workman is terminated. Remington's Revised Statutes of Washington, Section 7673; *State v. Postal Tel. Cable Co.*, 101 Wash. 630, 172 Pac. 902.

The Act is not one designed to award full compensation to each individual for all damages suffered, but is only a system *of limited insurance* whereby all industrial employees within the state are paid definite but limited amounts for injuries without regard to the particular individual circumstances or needs of the employee. *Foster v. Industrial Insurance Commission*, 107 Wash. 400, 181 Pac. 912. The Act is *an industrial insurance statute* in which "All the features of an insurance act are present" and which "compels both employers and employed to go into a scheme of insurance." *Stertz v. Industrial Insurance Commission, supra*, 91 Wash. 588, 158 Pac. 256.

The accident fund out of which the cost of accidents is paid (and so also the medical aid fund) is designed to be not more nor less than self-supporting, Remington's Revised Statutes of Washington, Supplement, Section 7676, as is true in any mutual insurance system. The premiums or contributions paid into the fund by employers, in accordance with their respective cost experiences, are trust funds to be devoted exclusively to the purposes contemplated by the Act. Remington's Revised Statutes of Washington, Supplement, Section 7676.

Thus, in holding that the legislature might not appropriate money out of the fund for a purpose foreign to the Act, even though the legislature itself had originally set up the Act, the Supreme Court of Washington said, in *State ex rel. Trenholm v. Yelle*, 174 Wash. 547, 549, 25 P.(2d) 569, 570:

> "The purpose of the workmen's compensation act, as originally enacted, and as amended from time to time by later statutes, has been, and is, to provide compensation for workmen injured in extrahazardous occupations as defined by the act. To that end, the act has created and established two funds known as the 'accident fund' and the 'medical aid fund,' respectively. The industries of the state engaged in extrahazardous work are required to pay into the accident fund certain premiums according to the schedule provided. The workmen so engaged are required to pay a certain percentage of their wages into the medical aid fund for its maintenance. These funds are therefore trust funds drawn from particular sources and devoted to special purposes.

By the act itself, the fund is impressed with a trust."

Although the legislative policy was "to remove all phases of the controversy" at common law between the employer and the employee, that is to say, all questions of liability or freedom therefrom, the Act was nevertheless very carefully drawn to preserve the right of the employer to appear as a party in the administration of each claim of an injured workman, and upon appeal to the courts from the decision of the Department:

Mud Bay Logging Company v. Department of Labor and Industries, 189 Wash. 285, 64 P.(2d) 1054; on rehearing, 193 Wash. 275, 75 P.(2d) 579;

State ex rel. Crabb v. Olinger, 191 Wash. 534, 71 P.(2d) 545;

Hoff v. Department of Labor and Industries, 198 Wash. 257, 88 P.(2d) 419;

Cole v. Department of Labor and Industries, 200 Wash. 296, 93 P.(2d) 413;

St. Paul & Tacoma Lumber Company v. Department of Labor and Industries, 19 Wn.(2d) 639, 144 P.(2d) 250;

Roellich v. Department of Labor and Industries, 20 Wn.(2d) 674, 148 P.(2d) 957.

In the *Mud Bay case*, the Department purported to make a settlement with a workman without giving his employer notice thereof. It was held that the Department's action constituted *a denial of due process of law* to the employer, which had a right to appeal to the courts on account thereof, the Supreme Court

of Washington saying that the order of the Department

> "dealt with and disposed of the primary question raised by Matela's petition to compromise and settle, to-wit: Is the claimant entitled to a permanent partial disability rating? That was a question upon which the logging company had a right to be heard and, as the department well knew from the logging company's participation in the Chehalis hearing, the very question which it desired to litigate.
>
> "* * * The employer has a right to appear before the department to be heard, and is given a statutory right of appeal."

Upon rehearing in the *Mud Bay* case, the court reviewed the Act and then said:

> "Thus, so far as appeals were concerned the employer and employee were virtually placed upon a parity. It is manifest that no distinction is made between employer and employee, except where an employer appeals from an order made (fixing penalties for operating without safeguards) under and by virtue of Rem. Rev. Stat., §7683 (P.C. §3477), in which case the employer must furnish a bond that he will fully comply with the judgment.
>
> "* * * * * * * * *
>
> "* * * There are seven sections providing for appeals by employers, one, §7697, being general in character and the remaining six being specific.
>
> "It is urged that the only right of appeal given to an employer is by virtue of the Laws of 1917, chapter 120, p. 477, §2, Rem. Rev. Stat., §7676. This section, it will be observed, refers to the fixing of rates to be charged the employer, the

rates being based to a large extent on the number and kinds of accidents that occur to the workmen of such employers.

"Should it be held that the employer has no right of appeal except by the provisions of the above section, he would find himself charged with certain accidents which would add to his cost experience without being given an opportunity to contest the same. Certainly, the employer could not dispute the rates under the Laws of 1917, chapter 120, p. 474, on the ground that the original charge to his cost experience on account of his workmen having been injured was improper. Under such circumstances, the department would be in a position to answer that the claims had been allowed after a proper hearing and the amounts so allowed paid to the workmen."

The court then commented upon certain of its cases:

Ek v. Department of Labor and Industries, 181 Wash. 91, 41 P.(2d) 1097;

Luton v. Department of Labor and Industries, 183 Wash. 105, 48 P.(2d) 199, and

Albrecht v. Department of Labor and Industries, 192 Wash. 520, 74 P.(2d) 22,

to which may be added:

Abraham v. Department of Labor and Industries, 178 Wash. 160, 34 P.(2d) 457;

Prince v. Saginaw Logging Company, 197 Wash. 4, 84 P.(2d) 397;

Carlson v. Department of Labor and Industries, 200 Wash. 533, 94 P.(2d) 191; and finally

LeBire v. Department of Labor and Industries, 14 Wn.(2d) 407, 128 P.(2d) 308,

from which it then, and now appears without question that an order of the Department or Superior Court, from which no appeal is taken, is *res judicata* of all issues before the tribunal rendering the decision against the employer as well as the workmen. The court continued, upon the Mud Bay rehearing:

> "If an employer was not given the right of appeal from a decision of the appellant's joint board, such decision would then, upon a hearing for the purpose of fixing rates, be held *res adjudicata* as to such claims, and the employer would be bound to have them charged against his cost experience. Such was not the intention of the legislature."

The processing of a claim by the Department and the courts, therefore, is a statutory action in which the employer is an affected and interested party. The employer's appeal not only protects him against the operation of the doctrine of *res judicata*, and protects his cost experience against unlawful or excessive awards, but also operates as a stay of an award to a claimant pending disposition of the appeal, *St. Paul & Tacoma Lumber Company v. Department of Labor and Industries, supra*, 19 Wn.(2d) 639, 144 P.(2d) 250; and a successful appeal by an employer from a judgment of the Superior Court in favor of a claimant defeats the award to the claimant even though the Department does not appeal from the Superior Court judgment. *Cole v. Department of Labor and Industries*, 200 Wash. 296, 93 P.(2d) 413.

The Industrial Insurance Law speaks of the employer's contributions throughout as "contributions,"

"premiums" and "assessments," never as a "tax." Nowhere in the act is language used even suggesting that the contributions are the price of carrying on business, doubtless, we think, because the Act has always been thought of as an insurance statute, not a revenue measure. On the other hand, by the State's Revenue Act of 1935, as amended (Remington's Revised Statutes of Washington, Supplement, Section 8370-1 *et seq.*, and particularly Section 8370-36 thereof and Section 8370-4, 1943 Permanent Supplement), the legislature has expressly levied taxes, for revenue, upon a great variety of businesses, "for the act or privilege of engaging in business activities."

The Act contains a provision expressly allowing an employer whose occupation is "non-extrahazardous" to make application to the director of labor and industries "to fix rates of contribution for such occupation for industrial insurance and medical aid," and thereby to elect to obtain coverage for himself and his employees. Remington's Revised Statutes of Washington, Section 7696. Each employee has five days, and each employee subsequently hired has five days after the date of his employment to decline to become subject to the act, Id., Section 7696, and an employer may revoke his election for coverage at any time, *State of Washington v. Bank of California, N.A.*, 187 Wash. 153, 59 P.(2d) 1128. Is it to be said that employers and employees can turn the tax laws on and off at will?

The industrial insurance system of the State of Washington is in substance different from the system

in force in 45 other states[1], where the employers carry their insurance with private carriers, only in that the State of Washington, as trustee and stakeholder but no more, holds the funds out of which employees are compensated. A proceeding upon the filing of each claim is conducted by the appellee Department in which the claimant and the employer are the financially interested parties, rather than the employee and an insurance carrier. The Department's order is subject to review by the courts as in other states. The contributions of employers do not differ in their essential nature (except for the lack of profit element) from premiums paid by employers to insurance carriers as in the other states.

Of course, the accident fund is not a private fund in the sense that it may be withdrawn or diverted by the contributors, but it is a trust fund which employers must replenish through future premiums, as depleted from time to time by awards to their workmen, and the Department, as stakeholder, has no financial interest in the fund. The director of the Department is empowered to fix the basic premium rates from time to time, as he may determine the condition of the fund requires, and in such manner as to insure that the fund shall not be more nor less than "self-supporting."

The contributions paid by employers, for the benefit of workmen and not to meet general public expenses, are insurance premiums as denominated by

---

[1]Ohio has an act quite similar to Washington's and there is no act in effect in Mississippi.

the Act itself. The employer is not interested, as he would be if the contributions were a tax, merely in whether his basic premium rate fixed, at the director's pleasure, is reasonable. Rather, he is vitally interested in the propriety and amount of each award made to his workmen, and the resulting charge to his cost experience, and the means of protecting that interest *in each case* is elaborately secured to him by the Act.

5. The majority opinion below considered further

The majority opinion in the case at bar recognizes that the employer has an appealable interest in each case, so that he may protect his cost experience and future premium rate. The opinion says also that when it is finally decided the claimant is entitled to compensation (and, we presume, when the amount thereof is fixed), the employer's interest ceases and all procedural and administrative questions thereafter lie only between the claimant and the Department. For argument's sake we may agree with this until expenses begin again or may begin, but it is then the position of the majority, in avoiding the *Danzer* decision and to bring the case within *Campbell v. Holt*, that the question whether the legislature can retroactively reopen the right of a claimant to compensation is a mere remedial or administrative matter between him and the Department with which the employer is not concerned.

But this is diametrically opposed to the court's premise that the employer is vitally concerned until it is decided that the claimant is entitled to compensa-

tion. The question of whether the appellee Rowley is entitled to a reopening of his claim and an additional award under the 1941 Act, where he had no right to more compensation before, does not involve a mere administrative matter within the Department. The question is whether the appellant's *future* premiums are to be increased to pay the *new* award authorized by the legislature on account of facts occurring long in the past, and with respect to which no right of any kind existed prior to the 1941 Act which attempted to revive a claim long expired, This is a serious substantive matter looking to the issue of whether Rowley is entitled to compensation, as the majority opinion says. The question is whether an act of the legislature can *create* a new statutory right retroactively in Rowley, to the appellant's damage, to replace the *right* previously *expired*, and it was held in the *Danzer* case that such a legislative act is unconstitutional.

It is suggested in the majority opinion that *Campbell v. Holt* applies because the Industrial Insurance Law as originally passed in 1911 did not contain a time limitation, it being inserted in the Act for the first time in 1927.

But in *Davis v. Mills*, 194 U. S. 451, it was made plain that this is not so. That case involved an action to recover upon a liability of corporate directors for violation of a duty imposed by statute. It was held that such statutory right of action was conditioned by a limitation provision, covering actions against corporate directors "to enforce a liability created by law," even though (as here) such provision

was enacted "at a different time" and was located (as is not true here) in a title different from the statute creating the liability. This court (through Mr. Justice Holmes) first noted that "ordinary" limitation statutes are treated as laws of procedure affecting the remedy only and not the right. The opinion continued (p. 454):

> "But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, *whether using words of condition or not. The Harrisburg*, 119 U.S. 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right." (Italics ours).

The limitation provision was inserted ten years before Rowley's injury, in the *very section* of the statute upon which his *right* was *based*, and immediately following the clause in that section which created the right. It is not the usual general statute of limitation, as in *Campbell v. Holt*, applying to all manner of common law causes of action, but is precisely the sort of

limitation which this court has repeatedly found to limit and condition the right created by the statute itself and, in truth, is exactly the sort of limitation which the Supreme Court of Washington, in every case which has heretofore come before that court, has found to condition the right.

Notwithstanding the majority opinion below, it must be said without equivocation either that the appellee Rowley's statutory rights in the absence of action on his part under the Act finally terminated upon the lapse of three years from the closing of his claim, without right of *revival* thereafter, or that the decisions of this court noted above, and those of the Supreme Court of Washington, are wrong. There is no reasonable distinction between those cases and the case at bar.

The majority opinion below refers to *Mattson v. Department of Labor and Industries*, 176 Wash. 345, 29 P. (2d) 675, 293 U.S. 151. In that case, this court held the time limitation, first inserted in 1927, was valid as against a workman who suffered an injury prior to the effective date of the amendment. The amendment preserved his right to apply for a reopening within three years after the limitation became effective and that was enough to make it constitutional. The *Mattson* case is nothing more than an application of the familiar rule that an amendment shortening the period of limitation is valid so long as it leaves a litigant a reasonable period of time within which to assert his right. It was held also by the Supreme Court of Washington in the *Mattson* case

that the Workmen's Compensation Act does not constitute a private contract between the employer and a workman, and hence that the 1927 amendment did not impair a contract in violation of the Constitution. No such contention is made here.

The *Mattson* case is relied upon by the majority, however, for the proposition that no "vested right" of the appellant is involved in this case. Use of this term merely tends to confuse the issue, which is simply whether the legislature, out of circumstances occurring long in the past, can retroactively recreate a right in Rowley and a liability upon the appellant to replace a right and liability which had long since expired.

The majority opinion below purports to interpret the Industrial Insurance Law as levying a tax on the privilege of doing business and otherwise to indicate that the employer has no substantial interest in the matter here in controversy. The whole history of the Act, its purposes, and its application in a whole host of circumstances, as discussed in the Washington Supreme Court's opinions, indicate that the majority's interpretation is purely formalistic. Of course a decision of a state court of last resort is conclusive on a mere question of construction, but this court is not bound by the characterization given to a state law by the state courts or legislature where the federal constitution is concerned and this court will regard the substantive nature and result of the litigation and its effect upon the federal right asserted.

Storaasli v. State of Minnesota, 283 U.S. 57;

Foster Fountain Packing Co. v. Haydel, et al., 278 U.S. 1;

Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U.S. 389;

Hanover Fire Insurance Co. v. Carr, 272 U. S. 179;

Truax v. Corrigan, 257 U.S. 312;

Crew Lavick Co. v. Commonwealth of Pennsylvania, 245 U.S. 292.

Although the department is the stakeholder, the Washington Industrial Insurance system is substantially the same as the system in all the other states but two, where, under laws enacted in the exercise of the police power, the rights and obligations of employees and employers are settled in administrative procedure and by review in the courts. In truth and in substance the responsibility of the appellant in this case to respond for a new award to the appellee Rowley was once terminated and the 1941 Act purports to create a new right out of old circumstances to the appellant's damage. In truth and in substance, this case is exactly the same as the *Danzer* case, and either that case or the majority decision below is wrong. The *Danzer* decision is founded upon a long line of respected decisions of this court and has never been, so far as we have been able to determine, questioned by any other court. It should be approved and confirmed by this court, and the judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted,

JOHN AMBLER,
T. J. HANIFY,
L. B. DONLEY,
WALTER KANE SCOTT,
H. S. MURRAY,
WILLIAM T. LAUBE,
Attorneys for Appellant.

APPENDIX OF STATUTES

[NOTE: The section numbers noted below refer to Remington's Revised Statutes of Washington. Except where express reference is made to the Supplements, the section will be found in the original work. Italics in all instances, except in headings, are ours.]

Section 7673. Declaration of police power. The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein *its police and sovereign power*, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end *all civil actions and civil causes of action* for such personal injuries *and all jurisdiction of the courts* of the state *over such causes are hereby abolished*, except as in this act provided.

Section 7674. (Supplement). Extra-hazardous employments—Enumeration and exceptions—Power of director to declare additional extra hazards—Hearing and review. There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term "extra-hazardous" wherever used in this act, to-wit:

(Set out here is a long list of industries or occupations, followed by a provision permitting the director of labor and industries, upon notice and hearing, to include other industries as extra-hazardous.)

Section 7676. (Supplement). Contribution rates for accident fund—Revision of rates by director—Assessments for deficits—Basic rates for years—Premium rates for years and mode of computing—Schedule of basic rates by classes—Payroll adjustments, notice of commencement of work, and payment of premium * * *. Inasmuch as industry should bear the greater portion of the burden of the cost of its accidents, each employer shall prior to the fifteenth day of every month, pay into the state treasury *(1) for the accident fund and (2) for the medical aid fund,* a certain number of cents for each man hour worked by the workmen in his employ, engaged in extra-hazardous employment; if, however, there should be a deficit in any class or sub-class the Director of Labor and Industires, through the Supervisor of Industrial Insurance, is hereby authorized and directed to assess the same against all the contributors to such class or sub-class during the calendar year or fraction thereof in

which said deficit was incurred or created. The Director of the Department of Labor and Industries shall have the power to promulgate, change and revise such rates according to the condition of the accident and medical aid funds, and to establish rates for industries declared to be extra-hazardous subsequent to the taking effect of this amendment and/or which voluntarily seek coverage under the elective adoption provisions of this act.

The amounts to be paid into the accident fund shall be determined as follows: The Department of Labor and Industries shall, prior to the first day of January of each year determine for each class and/or sub-class, *a basic premium rate* for the ensuing calendar year, and in so doing, shall take into consideration, first, the cost experience of each class and sub-class over the two-year period immediately preceding September first of the year in which the basic rate is being fixed; second, the then condition of each class and/or sub-class account.

The Department of Labor and Industries shall also, prior to the first day of January of each year determine the *premium* rate to be paid into said accident fund during the ensuing year by each employer to be credited to each class and/or sub-class account, applicable to the employer's operations or business, and in so doing, shall take into consideration, *the average cost experience of each employer* for each workman hour reported by him during each fiscal year in each such class or sub-class over the five-year period immediately preceding September first of the year in which the rate is being determined, and in so computing, the cost experience of any employer, the fixed sum of four thousand five hundred dollars ($4,500) shall be charged against his experience for each injury resulting in death or total permanent disability

of a workman instead of the actual cost to the accident fund of such injury. The actual *premium rate* which any employer shall be required to pay for the accident fund shall be forty per cent (40%) of the basic rate, plus sixty per cent (60%) of the employer's cost rate for each workman hour reported by him during each fiscal year over the five-year period next preceding the then last September first, but in no case shall the total rate exceed one hundred sixty per cent (160%) of the basic rate.

The *basic premium rates* for the accident fund and the medical aid fund, effective immediately upon the passage of this act until so modified by the Director of the Department of Labor and Industries, shall be in accordance with the following classifications, subclassifications and schedules:

(The letters "N.O.S." as used in this section shall mean "Not Otherwise Specified.")

(The letter "(S)" as used in this section shall mean suspension of collection of premiums in that fund for employers entitled to an individual rating.)

Ind. Ins. means *Industrial Insurance.*

Med. Aid means Medical Aid.

Occ. Dis. means Occupation Disease.

Wkmn. Hr. means Workman Hour.

* * * * * * * *

	Industrial Insurance Cents Per Workman Hour	Melical Aid Cents Per Workman Hour	Occupational Disease Cents Per Workman Hour
Class 1.			
1-1 Ditches and canals (N.O.S.)	3.2	.4	.1
Canals and other irrigation	3.2	.4	.1

[Here follow the rates for the remaining 89 subclasses.]

Every employer who shall enter into any business, or who shall resume operations in any work or plant after the final adjustment of his payroll in connection therewith, shall, before so commencing or resuming operations, as the case may be, notify the Director of Labor and Industries of such fact, accompanying such notification with an estimate of his payroll and workmen hours for the first calendar month of his proposed operations, and shall be liable for a *premium* of at least such estimate. Every such employer shall pay the full basic rate until such time as an experience rating in excess of a one, two, three or four year period may be computed as of a first succeeding September first date, and shall be liable for a *premium* of at least one dollar ($1.00) per month irrespective of the amount of his workmen hours reported during said month to the Department.

To the end that no employer shall evade the burden imposed by an unfavorable or high cost experience, the Director of Labor and Industries shall have the power to determine whether or not an increase, decrease or change (a) of operating property; (b) of interest in operating property; (c) of employer; (d) of personnel or interest in employer is sufficient to show a bona fide change which would make inoperative any high cost experience.

Every employer within the provisions of this act shall on or before the fifteenth day of each month hereafter furnish the Department with a true and accurate payroll and the aggregate number of workmen hours, during which workmen were employed by him during the preceding calendar month, the total amount paid to such workmen during such preceding calendar month, and a segregation of employment in the different classes provided in this act, and shall pay his *premium* thereon to the accident fund and

medical aid fund. The sufficiency of such statement shall be subject to the approval of the Director of Labor and Industries.

Every employer shall keep at his place of business a record of his employment from which the above information may be obtained and such record shall at all times be open to the inspection of the Director of Labor and Industries, Supervisor of Industrial Insurance, or the traveling auditors, agents or assistants of the Department, as provided in section 7690 of Remington's Revised Statutes of Washington.

In all cases where partners or other persons are excluded on the payroll such treatment shall state both the names and occupations of the parties excluded and no such person shall be entitled to compensation unless notice in writing that such excluded person has been included is received by the Department prior to the date of injury to such person. Such employer shall at the time of reporting his payroll and workmen hours also state the names and addresses of any contractor or sub-contractor operating for or under him.

Every person, firm, or corporation who shall fail to keep such record or fail to make such report in the manner and at the time herein provided shall be subject to a penalty of not to exceed one hundred dollars ($100) for each such offense, to be collected by civil action in the name of the state and paid into the accident fund.

Every employer who shall fail to furnish an estimate of payroll and workmen hours and make payments as above provided shall be liable to a penalty of not to exceed five hundred dollars ($500) and shall also be liable if an accident has been sustained by an employee prior to the time such estimate is received by the Department, to a penalty in a sum equal to

fifty per cent (50%) of the cost to the accident fund and medical aid fund of such accident, to be collected in a civil action in the name of the state, and paid into the accident fund and/or medical aid fund. The Director of Labor and Industries may waive the whole or any part of any penalty charged under this act. In respect to any injury happening to any of his workmen during the period such employer shall be in default in the payment of any *premium*, if such default be after demand for payment, or if such employer shall be in default for failure to furnish the Department with an estimated payroll and workmen hours or with monthly reports of his payroll and workmen hours as required by this section, the defaulting employer shall not be entitled to the benefits of this act, but shall be liable to suit by the injured workman (or his beneficiaries and dependents), at his or their option, as he would have been on March 14, 1911, and in any action brought against such employer, it shall be no defense for such employer to show that such injury was caused in whole or in part by the negligence of a fellow servant of the injured workman, that negligence of the injured workman, other than his willful act committed for the purpose of sustaining the injury contributed to the accident or that the injured workman had knowledge of the danger or assumed the risk which resulted in his injury. If such injured workman or his beneficiaries, or dependents, shall elect to take under this act, such action against the employer shall revert to the state for the benefit of the accident fund and/or the medical aid fund.

Any employer, who shall misrepresent to the Department the amount of his payroll or the number of workmen hours upon which the *premium* under this act is based, shall be liable to the state in ten times the amount of the difference in *premiums* paid and the amount the employer should have paid, and shall also

be guilty of a misdemeanor if such misrepresentations shall be made knowingly. Civil penalties to the state under this act shall be collected by civil action in the name of the state and *paid into the accident fund.*

For the purpose of such payments into the accident fund, accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. Each class shall meet and be liable for the accidents occurring in such class. The fund thereby created shall be termed the "accident fund" *which shall be devoted to the purpose specified for it in this act.*

The medical aid fund created in section 7713 of Remington's Revised Statutes of Washington shall not be kept by classes and all payments shall be made from the one fund, but accounts shall be kept with each class and sub-class of industry in accordance with the classification herein provided for the purpose of computing the medical aid cost experience of such classes and sub-classes and determining the correctness of the medical aid rates charged such classes and sub-classes.

It is the intent that the accident fund created under this section shall ultimately become neither more nor less than *self-supporting*, exclusive of the expense of administration, and if in the adjustment of *premium rates* by the Director of Labor and Industries the moneys paid into the fund by any class or classes shall be insufficient to properly and safely distribute the burden of accidents occurring therein the Department may divide, rearrange or consolidate such class or classes, making such adjustment or transfer of funds as it may deem proper.

It shall be unlawful for the employer to deduct or obtain any part of the *premium* required by this sec-

tion to be by him paid into the accident fund from the wages or earnings of his workmen or any of them, and the making or attempting to make any such deduction shall be a gross misdemeanor. The Director of Labor and Industries shall make corrections of classifications or sub-classifications or changes in rates, classes, and sub-classes when the best interests of such classes or sub-classes will be served thereby. From the original classification or *premium* rating or any change made therein, any employer claiming to be aggrieved may appeal to the joint board and to the courts in the manner provided in section 7697 of Remington's Revised Statutes.

If a single establishment or work comprises several occupations in this section in different risk classes, the *premium* shall be computed according to the workmen hours of each occupation, or in the discretion of the Director of Labor and Industries, a single rate of *premium* may be charged for the entire establishment based upon the rate of *premium* of the occupation reporting the largest number of workmen hours; Provided, That, when a single establishment or work comprises distinct different risk classes, each employing a considerable number of persons, the right to have the *premium* computed according to the number of workmen hours of each occupation shall not be denied the employer without hearing: Provided further, That any employer desiring to report his operations in the various distinct risk classifications, subsequent to the passage of this act, must, before so reporting, notify the Director of Labor and Industries in writing of such fact, prior to the first day of the month in which such employer desires to segregate his operations, and inform the Director of the segregated classifications he desires. After an employer has segregated his operations into the various distinct risk classifications, unless the employer and Director

agree to the contrary, the employer must continue to report in those segregated classifications as long as exist in his operation and involve a considerable number of employees.

The Director of Labor and Industries shall have power to authorize any employee of the Department who is an attorney admitted to practice law in the State of Washington to appear for the department in any action instituted for the purpose of collecting *industrial insurance premiums.*

That the *premiums* of employers operating coal mines which shall include shaft sinking and all tunneling in connection with coal mines and the building industry, which shall include, all field activities in connection with the erection, alteration, repairing or demolishing of any building or buildings, or part thereof or appurtenance thereto, adapted to residential, business, governmental, education or manufacturing uses, shall be computed on a base rate only and no merit rating credits or penalties shall be given or imposed on such employers.

Section 7679. [The original section was in force at the time of the appellee Rowley's injury. The section, as amended in 1941, is set out in the 1941 Permanent Supplement, and subsection (h) of the section as so amended is the challenged statute. The original section and the section as amended in 1941, insofar as reproduced here, are the same except for the substitution of the word "five" for the word "three," as indicated by italics, in subsection (h).] *Schedule of awards.* Each workman who shall be injured in the course of his employment, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this Act otherwise provided, such payment shall be in lieu of any

and all rights of action whatsoever against any person whomsoever.

COMPENSATION SCHEDULE

[Here follows an enumeration of awards:

(1) Burial expenses in cases of deceased workmen;

(2) Monthly payments to the surviving widow for life, or children until the age of 18 is reached, of a deceased injured workman;

(3) Monthly payments for life to injured workmen who are totally and permanently disabled;

(4) Monthly payments to workmen totally but temporarily disabled, until they are able to return to gainful occupations;

(5) Lump sum awards to workmen suffering certain specified permanent disabilities, as well as "unspecified" disabilities not involving amputation or other loss of a part of the body.]

(g) Should a further accident occur to a workman who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjudged according to the other provisions of this section and with regard to the combined effect of his injuries and his past receipt of money under this act.

Should a workman receive an injury to a member or part of his body already from whatever cause permanently partially disabled, resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability but not resulting in the permanent total disability of such workman, his compensation for such permanent partial disability shall be adjudged with regard to the previous disability of the injured member or part and the degree or extent of the aggravation or increase of disability thereof.

(h) If aggavation, dimunition, or termination of

disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the Director of Labor and Industries, through and by means of the Division of Industrial Insurance, may, upon the application of the beneficiary, made within *five* years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: Provided, Any such applicant whose compensation has heretofore been established or terminated shall have *five (5)* years from the taking effect of this act within which to apply for such readjustment.

[Here follow further subsections of no particular importance here.]

Section 7696. *Employer's elective adoption of act—Workman's election.* Any employer engaged in any occupation other than those enumerated or declared to be under this act as provided in section 7674, may make written application to the director of labor and industries to fix *rates of contribution* for such occupation *for industrial insurance* and for medical aid, and thereupon it shall be the duty of the director of labor and industries through the division of industrial insurance to fix such rate, *which shall be based on the hazard of such occupation* in relation to the hazards of the occupations for which rates are prescribed. When such rate shall be so fixed such applicant may file notice in writing with the supervisor of industrial insurance, giving ten days' notice of his or its election to contribute under this act, and shall forthwith display in a conspicuous manner about his or its works and in sufficient number of places to reasonably inform his or its workmen of the fact, printed

notices furnished by the department stating that he or it has elected to contribute to the accident fund and the medical aid fund and stating when said election will become effective. Any workman in the employ of such applicant shall be entitled at any time within five days after the posing of said notice by his employer, or within five days after he has been employed by an employer who has elected to become subject to this act as herein provided, to give a written notice to such employer and to the department of his election not to become subject to this act. At the expiration of the time fixed by the notice of such employer, the employer and such of his or its workmen as shall not have given such written notice of their election to the contrary shall be subject to all provisions of section 7673 and 7796, and entitled to all of the benefits thereof: Provided, however, That those who have heretofore complied with the foregoing conditions and are at the time of the passage of this amendment carried and considered by the department as within the purview of this act shall be deemed and considered as having fully complied with its terms and shall be continued by the department as entitled to all of the benefits and all of the liabilities without other or further action.

Section 7697. (1943 Permanent Supplement) *Court review—Application for rehearing by joint board and proceedings thereon.* Whenever the Department of Labor and Industries has made any order, decision or award, it shall promptly serve *the claimant, employer or other person affected thereby,* with a copy thereof by mail, which shall be addressed to such claimant, employer or person at his last known address as shown by the records of the department. Any claimant, employer or other person *aggrieved by any such order, decision or award*

must, before he appeals to the courts, serve upon the Director of Labor and Industries by mail or personally, within sixty days from the day on which such copy of such order, decision or award was communicated to the applicant, an application for rehearing before the Joint Board of said department, consisting of the Director of Labor and Industries, the Supervisor of Industrial Insurance and the Supervisor of Safety. Such application shall set forth in full detail the grounds upon which the applicant considers such order, decision or award is unjust or unlawful, and shall include every issue to be considered by the Joint Board, and it must contain a detailed statement of facts upon which such claimant, employer or other person relies in support thereof. The claimant, employer or other person shall be deemed to have waived all objections or irregularities concerning the matter on which such rehearing is sought other than those specifically set forth in such application for rehearing or appearing in the records of the Department. If the Joint Board, in its opinion, considers that the Department has previously considered fully all matters raised by such application it may, without further hearing deny the same and confirm the previous decision or award, or if the evidence on file with the Joint Board sustains the applicant's contention, it may, without further hearing, allow the relief asked in such application, otherwise, it shall order a rehearing to decide the issues raised. If a rehearing be granted it shall be heard in the county of the residence of the applicant, or in the county where the injury occurred, at a place designated by the Joint Board, but the hearing thereof may be adjourned from time to time from place to place within said county, as the convenience of witnesses may require. Such rehearing shall be de novo and summary, but not witness' testimony shall be received unless he

shall first have been sworn to testify the truth, the whole truth and nothing but the truth in the matter being heard, or unless his testimony shall have been taken by deposition according to the statutes relating to Superior Courts of this state. The Joint Board shall cause all oral testimony to be stenographically reported and thereafter transcribed, and when transcribed the same, with all depositions, shall be filed in, and remain a part of the record on the rehearing. Such rehearing may be conducted by one or more members of the Joint Board, or by some person or persons in the regular employ of the Department, duly commissioned by said Board to conduct such hearing, but the record on rehearing shall be considered by all of the members of said Joint Board, and the decision of a majority of said Joint Board shall be the decision of the Joint Board, and upon such decision being rendered all parties to said rehearing shall be given written notice thereof by the Joint Board.

An application for rehearing shall be deemed to have been denied by the Joint Board unless it shall have been acted upon within thirty days from the date of service: Provided, however, That the Joint Board may in its discretion, extend the time within which it may act upon such application, not, exceeding thirty days.

[Here follow provisions concerning the conduct of hearing, punishment for contempt, etc.]

Within thirty days after the final order of the Joint Board upon such application for rehearing has been communicated to such applicant, or within thirty days after rehearing is deemed denied as herein provided, such applicant may appeal to the Superior Court of the county of his residence, or to the Superior Court of the county where the injury occurred, but

upon such appeal may raise only such issues of law or fact as were properly included in his application for rehearing; or in the complete record in the Department. On such appeal the hearing shall be *de novo*, but the appellant shall not be permitted to offer, and the court shall not receive, in support of such appeal, evidence or testimony other than, or in addition to, that offered before the Joint Board or included in the record filed by the Department: Provided, That the right of cross-examination shall not be limited by the testimony before the Joint Board. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. Such appeal shall be perfected by filing with the Clerk of the Court a notice of appeal and by serving a copy thereof by mail, or personally, on the Director of Labor and ndustries. The Department of Labor and Industries shall, within twenty days after receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed at issue. No bond shall be required on such appeal or on appeals to the Supreme Court, except that an appeal by the employer from a decision of the Department under section 7683 of Remington's Compiled Statutes shall be ineffectual unless, within five days following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to perform the judgment of the court. Except in the case last named an appeal shall not be a stay. The calling of a jury shall rest in the discretion of the court, except that in cases arising under section 7683 and 7690 of Remington's Compiled Statutes, either party shall be entitled to a jury trial upon demand.

The Department of Labor and Industries shall serve upon the appellant and file with the Clerk of the Court

before trial, a certified copy of its complete record on the claim, which shall, upon being so filed, become a part of the record in such case.

If the court shall determine that the Department has acted within its power and has correctly construed the law and found the facts, the decision of the Department shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the Superior Court shall refer the same to the Department of Labor and Industries with an order directing it to proceed in accordance with the findings of the court: Provided, That any award shall be in accordance with the schedule of compensation set forth in this act.

It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the court in the case, and if the decision of the Joint Board shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund, if the accident fund is affected by the litigation. In other respects the practice in civil cases shall apply. Appeal shall lie from the judgment of the Superior Court as in other civil cases. The Attorney General shall be the legal adviser of the Joint Board and shall represent it in all proceedings. In all court proceedings under or pursuant to this act the decision of the Department shall be prima facie correct and the burden of proof shall be upon the party attacking the same.

Section 7697-2 (Supplement). *Jury trial on appeal —De novo trial—Effect.* In all appeals to the Superior Court from any order, decision or award of the joint board of the Department of Labor and Industries, either party shall be entitled to a trial by

jury upon demand. The jury's verdict in every such appeal shall have the same force and effect as in actions at law. In any such appeal the trial shall be *de novo* and no party to the appeal shall be permitted to introduce evidence in court in addition to that contained in the departmental record.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 53

GANGE LUMBER COMPANY, *Appellant*;

vs.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Appellees.*

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON.

REPLY BRIEF OF APPELLANT

JOHN AMBLER,
T. J. HANIFY,
L. B. DONLEY,
WALTER KANE SCOTT,
H. S. MURRAY,
WILLIAM T. LAUBE,
Attorneys for Appellant.

812 Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 53

GANGE LUMBER COMPANY, *Appellant,*

vs.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Appellees.*

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON.

REPLY BRIEF OF APPELLANT

JOHN AMBLER,
T. J. HANIFY,
L. B. DONLEY,
WALTER KANE SCOTT,
H. S. MURRAY,
WILLIAM T. LAUBE,
Attorneys for Appellant.

812 Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

	Page
1. There is no statutory interpretation by the court below which disposes of this case	1
2. Jurisdiction is clear	2
3. The interest of the appellant is clear	4
4. The authorities in the appellee Department's brief are not persuasive	6
5. The 1942 Amendment did not merely restore a means of "Judicial Review"	9

TABLE OF CASES

Bostwick v. Brinkerhoff, 106 U.S. 3	4
Botica v. Department of Labor and Industries, 184 Wash. 573, 52 P.(2d) 332	10, 11
Campbell v. Holt, 115 U.S. 620	6, 7, 8
Chase Securities Corporation v. Donaldson, ... U. S. ....., 89 L. ed. (No. 15) 1109, 1113 (May 31, 1945)	6, 7, 8
City of Paducah v. East Tenn. Tel. Co., 229 U.S. 476	3
Danzer (William) & Co. v. Gulf & S. I. R. Co., 268 U.S. 633	6, 7, 8, 12
Davis v. O'Hara, 266 U.S. 314	4
Ferguson Company v. Seaman, 119 N.J.L. 575, 197 Atl. 245	8
Georgia Railway Co. v. City of Decatur, 262 U.S. 432	3, 4
Grant v. Phoenix Mut. L. Ins. Co., 106 U.S. 429	4
Grays Harbor County v. Coats-Fordney, 243 U.S. 251	4
King v. West Virginia, 216 U.S. 92	4
MacVeigh v. Unemployment Compensation Commission, 19 Wn.(2d) 383, 142 P.(2d) 900	10
Mattson v. Department of Labor and Industries, 293 U.S. 151	9
McGourkey v. Toledo & O. C. R. Co., 146 U.S. 536	3
Messinger v. Anderson, 255 U.S. 436	4

Page

Montgomery v. Seneca Iron & Steel Co., 257 N.Y. S. 556 8
Mower v. Fletcher, 114 U.S. 127 3
Nagel v. Department of Labor and Industries, 189 Wash. 631, 66 P.(2d) 318 10
New Amsterdam Casualty Co. v. Cardillo, 108 F. (2d) 492 8
Norton, Ex parte, 108 U.S. 237 3
Paramino Lumber Company v. Marshall, 309 U.S. 370 8
State ex rel. Griffen v. State Industrial Accident Commission, 145 Or. 443, 28 P.(2d) 237 7
Smith v. Department of Labor and Industries, 8 Wn.(2d) 587, 112 P.(2d) 57 ..... 11, 12
Vincent v. Allerton House Company, 256 N.Y. 522, 177 N.E. 25 9

STATUTES

Remington's Revised Statutes of Washington:
§7679(h) 9, 11, 12
§7697 ..... 6, 11
Supplement, §7676 5
Permanent Supplement, §7697 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 53

GANGE LUMBER COMPANY, *Appellant,*

vs.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Appellees.*

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON.

REPLY BRIEF OF APPELLANT

---

1. There Is No Statutory Interpretation by the Court Below Which Disposes of this Case.

It was contended by the appellant in the Washington Supreme Court that the 1941 amendment should be interpreted only as extending the time for applying to reopen cases where the right to reopen had not become barred prior to the effective date of the amendment, but should not be interpreted as applying retroactively to permit reopening where the time therefor had expired. The Washington Supreme Court, however, interpreted the 1941 amendment against the appellant's contention.

This, of course, is a true interpretation, which is

binding on this court. The appellee Department urges, however, that the Court below interpreted the statute as "applying to the remedy and not the right", and that this "interpretation" is binding here and is an independent state ground upon which the decision below can be rested.

But this conclusion of the Washington Supreme Court is a *statement of a result*, not an interpretation (or statement of the meaning) of the statute. If the Washington Supreme Court could thus purport to prevent an inquiry into the constitutionality of this statute, then the jurisdiction of this court in constitutional matters could be divested completely by the decisions of the courts of last resort about the country.

The very question in issue in this case, upon constitutional considerations, is whether the *result* of the 1941 amendment was to affect the substantial rights and liabilities of the parties, or was to relate only to procedural matters. The Washington Supreme Court's decision that only a procedural matter was involved, was a decision squarely on the constitutional question involved and was not a mere interpretation of the statute. It is the province of this court to regard the *substantive nature and result* of the litigation and its *effect* upon the federal right asserted (see the authorities at page 45 of our opening brief).

2. Jurisdiction Is Clear.

There is no independent state ground upon which the decision below can be rested. It is stated, however, at page 11 of the appellee Department's brief, that the first decision of the Washington Supreme Court "foreclosed all questions" in the case, with the intimation,

apparently, that the first decision below was a final judgment and that the second decision, from which the present appeal is taken, was not an appealable judgment.

Upon the first decision below it was held that the 1941 amendment was not unconstitutional and that the appellee Department had therefore improperly denied a hearing upon the merits of the appellee Rowley's application for additional compensation, and the effect of the decision was to remand the case to the Department for the purpose of holding a hearing upon the merits of the application. (R. 7, 9, 10, 13, 20, 21, 22, 23.)

Up to that point it was unknown, of course, whether any aggravation of the appellee Rowley's disability had in fact occurred and whether, assuming the validity of the 1941 amendment, he would be entitled to further compensation. Obviously, therefore, the first decision was not appealable and no final judgment was entered until after the case was adjudicated on the merits and until the Supreme Court of Washington, upon the second decision, had affirmed the appellee Department's order directing payment of additional compensation. (R. 24, 25, 26, 27, 32, 38, 44.)

Georgia Railway Co. v. City of Decatur, 262 U.S. 432;

City of Paducah v. East Tenn. Tel. Co., 229 U.S. 476;

McGourkey v. Toledo & O. C. R. Co., 146 U.S. 536;

Mower v. Fletcher, 114 U.S. 127;

Ex Parte Norton, 108 U.S. 237;

Grant v. Phoenix Mut. L. Ins. Co., 106 U.S. 429;

Bostwick v. Brinkerhoff, 106 U.S. 3.

The opinion on the second appeal below stated that the court's first decision had become "the law of the case", and the court therefore refused to pass upon the constitutional question a second time. But, of course, the phrase "the law of the case" refers only to the practice of courts generally to refuse to reopen what has been decided and obviously cannot limit the power of this court; rather, after the case is adjudicated on the merits and a final judgment is entered upon the second appeal, this court will search the entire record in its inquiry into the constitutional question.

Davis v. O'Hara, 266 U.S. 314;

Georgia Railway Co. v. City of Decatur, *supra*, 262 U.S. 432;

Grays Harbor County v. Coats-Fordney, 243 U.S. 251;

Messinger v. Anderson, 255 U.S. 436;

King v. West Virginia, 216 U.S. 92.

3. The Interest of the Appellant Is Clear.

It is suggested at pages 16 and 17 of the appellee Department's brief that no evidence was introduced in any of the proceedings below, and that it does not appear from the record that the appellant is now a contributor to the accident fund, or will be a contributor in the month of September following the final payment of the new award, or that the appellant will not then be over the maximum premium rate (with the infer-

ence, therefore, that the additional award would have no effect upon the appellant's actual premium rate).

These suggestions do not accord with the nature and operation of the Industrial Insurance Law. It appears conclusively from the record that the appellant was the employer at the time of the injury, to whose cost experience the new award would therefore be chargeable, and was the party served with notice, as required by law, of the present proceedings before the appellee Department for the reopening of the appellee Rowley's claim, including, particularly, the award of additional compensation. (R. 1-10)

The result of the decision below, if unappealed, would be to require the appellee Department forthwith to charge the amount of the additional award to the appellant's cost experience under the law. (Remington's Revised Statutes, Supplement, Section 7676.) This is an immediate, accrued *liability* which would be payable during the five-year period ensuing after the September first following the date the award would become final. It is the 1941 amendment, and the judgment of the Supreme Court of the State of Washington in aid of the statute, requiring this charge and liability which deprives the appellant of its property without due process of law.

It is idle to speculate whether the appellant might go out of business in the ensuing five-year period, or whether in some year during that period some catastrophic set of circumstances should force the appellant's actual premium rate to the maximum rate. The *liability* for increased premiums attaches forthwith upon the finality of the award. The judgment of the

Supreme Court of Washington requiring this result, in the absence of the present appeal, would be *res judicata* of the validity of the charge against the appellant's cost experience and the inclusion of the new award in the computation of the appellant's future premium rate. It is because of these circumstances that notice of an award made by the Department is required by the Law to be served upon the employer and why he is accorded the right of appeal to the courts (see the authorities at pages 35 to 38, inclusive, of our opening brief), and it was because of these circumstances that the Supreme Court of Washington in the present case was called upon to decide, and did decide, upon the constitutionality of the 1941 amendment.

[It might be noted in passing that a hearing before the Joint Board of the Department, the only tribunal where evidence may be introduced in a case of this kind, was denied on the two occasions when the matter came before that Board. R. 9, 32; Remington's Revised Statutes of Washington, Section 7697, and 1943 Permanent Supplement, Section 7697.]

4. The Authorities in the Appellee Department's Brief Are Not Persuasive

It is interesting to note that neither the *Danzer* case nor any of the cases upon which it is based is mentioned in the appellee Department's brief. *Chase Securities Corporation v. Donaldson* is cited and quoted from, but its careful distinction of the case itself, and of the *Danzer* case, from *Campbell v. Holt* is not considered in the Department's brief.

As stated in the *Donaldson* case, "In the *William Danzer & Co.* case it was held that where a statute in creating a liability also put a period to its existence, a retroactive extension of the period after its expiration amounted to a taking of property without due process of law."

Notwithstanding the statements in the Washington Supreme Court's opinion, and in the appellee Department's brief, to the effect that the 1941 amendment affected "only the remedy and not the right," it is unquestionably true that the Industrial Insurance Law created Rowley's right to additional compensation and the appellant's accompanying liability (our opening brief, page 15), that this right and liability terminated upon the lapse of three years (id., pages 16 to 25) and that the 1941 amendment is an attempt retroactively to extend the period after its expiration. This case, we submit, is squarely within the rule of the *Danzer* case and, as indicated by the careful opinion in the *Donaldson* case, is not within *Campbell v. Holt* where the usual rule that the general statute of limitations merely bars the common law remedy of a litigant was applied.

The cases cited in the appellee Department's brief do not persuade a different conclusion. *State ex rel. Griffen v. State Industrial Accident Commission*, 145 Or. 443, 28 P.(2d) 237, held merely that a judgment of the circuit court, upon appeal from the commission's original closing order, directing payment of monthly compensation for a period of 64 months did not prevent termination of compensation by the commission on its own motion, after its discovery that the bene-

ficiary had recovered completely from his disability within the 64-month period. The only question involved in the case was one of statutory interpretation. So also in *Montgomery v. Seneca Iron & Steel Co.*, 257 N.Y.S. 556, it was held, as a matter of statutory interpretation, that an amendment applied retroactively and, although *Campbell v. Holt* was mentioned in the opinion, no constitutional question was before, or decided by the court.

The amendment in *Paramino Lumber Company v. Marshall*, 309 U.S. 370, was a private act, for the benefit of a single individual, passed "to cure a defect in administration developed in the handling of a compensable claim." The Court said it was unnecessary in such a case to consider whether either *Campbell v. Holt* or the *Danzer* case applied. The 1941 Amendment in case at bar obviously was not such a private act, and the important distinction between *Campbell v. Holt* and the *Danzer* case was lately recognized in *Chase Securities Corporation v. Donaldson.*

In *New Amsterdam Casualty Co. v. Cardillo*, 108 F. (2d) 492, the court held explicitly that "Congress had the power to extend or contract the period of limitation as applicable to an indemnity claim *either pending or subsequently brought*," pointing out that "an award had been made (before the amendment to the statute), but the ultimate disposition of the case was still *undetermined and subject to change.* All the amendment did was to extend the time *for this purpose*" (emphasis supplied). And in *Ferguson Company v. Seaman*, 119 N.J.L. 575, 197 Atl. 245, the amendment to the statute applied to a case which was still

pending for final settlement, it being held that the due process clause did not prevent an extension of time for taking action upon a pending claim and that the extension of time did not impair the obligation of any contract between the workman and his employer. It has been conceded throughout the instant case that the 1941 amendment in question extended the time for applying to reopen claims not barred on the effective date of the amendment, and it is not asserted that an obligation of contract has been impaired by the amendment.

Mattson v. Department of Labor and Industries, 293 U.S. 151, and *Vincent v. Allerton House Company*, 256 N.Y. 522, 177 N.E. 25, are nothing more than applications of the familiar rule that a legislature may shorten the period of limitations so long as it leaves a litigant a reasonable period of time within which to assert his right. No legislative attempt was involved in either of these cases to revive an expired statutory right or to re-create an expired statutory liability.

5. The 1941 Amendment Did Not Merely Restore a Means of "Judicial Review"

As the brief of the appellee Department points out, the section of the Industrial Insurance Law in question, Section 5(h) thereof, originally authorized the filing of an application by a beneficiary for reopening of a claim and additional compensation without limitation as to time. The time limitation was first inserted, into this same section of the Law, in 1927.

The brief of the appellee Department then concludes

from this (page 21) that "the *right* of *judicial review* of such refusal [of the Department to reopen a claim] was withdrawn in 1927 if the claim had been closed for more than three years" and (page 20) that "The 1941 amendment here drawn in controversy * * * merely restores * * * the right of *judicial review* in the event the Department of Labor and Industries refused to allow such relief." (Italics supplied.)

This, of course, infers that from 1927 to 1941 the beneficiary had a *right* to file an application for reopening even though the three-year period had expired. It would then follow, since this right existed, that the Department was *obliged* to consider the application and award additional compensation if such was justified, *in the Department's judgment*, on the merits; but since the beneficiary had no means of judicial review, the Department might deny *any* application without recourse by the beneficiary.

Actually, since 1927 the Department has never been required to consider a late claim, and in fact the Department *has no power to do so*, should it be so inclined. *Nagel v. Department of Labor and Industries*, 189 Wash. 631, 66 P.(2d) 318; and see *MacVeigh v. Unemployment Compensation Commission*, 19 Wn. (2d) 383, 142 P.(2d) 900.

As the Supreme Court of Washington said in *Botica v. Department of Labor and Industries*, 184 Wash. 573, 52 P.(2d) 332, "the statute (after 1927) bars the *right* of the workman *to file an application*"; it did not give him a right to apply but simultaneously withhold the means of review. The insertion of the time limitation in 1927 did not merely suspend the

means of judicial review, pending the possible action of some future legislation; rather, a timely filing has always, since 1927, been jurisdictional (see the authorities at page 6 of our opening brief).

Section 5(h) of the Law has been codified since 1932 as Section 7679(h) of Remington's Revised Statutes of Washington. Section 20 is Section 7697 of the Code. The latter section, from the inception of the Law in 1911, has made elaborate provision for *judicial review* of decisions of the appellee Department. Under this section, a review of the Department's rejection of an application for reopening, regardless of the time of filing, was available from 1911 to 1927; and since 1927, a review, under Section 7697, of the Department, now lodged in its Director, was retained been, and still is available.

The brief of the appellee Department points out that Section 5(h) of the Law [now section 7679(h)] originally authorized the reopening of a claim by the Department *upon its own motion*. This power of the Department, now lodged in its Director, was retained in Section 5(h) in 1927 when the three-year limitation upon the *right* of the beneficiary was inserted into the section. The *right* of the beneficiary to demand reopening of his claim and the discretionary power of the Director have been recognized as being entirely independent one from the other, and the exercise of this discretionary power by the Director can be neither compelled nor reviewed, *Botica v. Department of Labor and Industries*, *supra*, 184 Wash. 573, 52 P.(2d) 332; *Smith v. Department of Labor and Industries*, 8 Wn.(2d) 587, 112 P.(2d) 57.

The appellee Department's brief observes correctly that it was held in the *Smith* case that the three-year time limitation does not apply to the Director's discretionary power under Section 5(h), but it is then reasoned (page 22) that the *Smith* case "demonstrates that no *right* is involved by the amendment now under attack, for had the legislature not enacted the challenged amendment the director, nevertheless has the power to reopen this and every other case and award additional compensation no matter when closed .The statute did not revive a dead claim." (Emphasis supplied).

This fails to observe the obvious distinction between the *right* of a beneficiary *to demand, and enforce* a grant of compensation and the *power* of the Director, *on his own motion*, to make a grant thereof. So far as this case is concerned, the Director's power would be no different were it vested in the Governor, or some other administrative agency, and the award, upon the exercise of the power, payable out of the general fund of the State. The Director's power is now a means wisely included in the Law to permit the reopening of an expired, but meritorious case, and to permit reopening and termination of further monthly compensation in the opposite sort of case. In the case at bar we are dealing with the *expired statutory rights* of beneficiaries and the correlative *expired statutory responsibilities* of employers; we are not dealing with the purely independent discretionary power of the Director.

It was held in the *Danzer* case than an expired statutory right and its accompanying liability cannot

be re-created after their expiration. The 1941 amendment is an attempt to do so.

Respectfully submitted;

JOHN AMBLER,
T. J. HANIFY,
L. B. DONLEY,
WALTER KANE SCOTT,
H. S. MURRAY,
WILLIAM T. LAUBE,
Attorneys for Appellant.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1945

NO. 53.

GANGE LUMBER COMPANY, *Appellant,*

v.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE

SMITH TROY,
Attorney General of the State of Washington,

HARRY ELLSWORTH FOSTER,
Special Assistant Attorney General of the State of Washington,

Counsel for Appellee, Department of Labor and Industries.

501 Security Building, Olympia, Washington.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1945

NO. 53

GANGE LUMBER COMPANY, *Appellant,*

v.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE

SMITH TROY,
Attorney General of the State of Washington,

HARRY ELLSWORTH FOSTER,
Special Assistant Attorney General of the State of Washington,

Counsel for Appellee, Department of Labor and Industries.

501 Security Building, Olympia, Washington.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

TOPICAL INDEX

	Page
OPINIONS BELOW	7
QUESTION PRESENTED	8
STATEMENT OF THE CASE	8
SUMMARY OF ARGUMENT	9
ARGUMENT	11
Is This Case Properly Here?	11
Purpose of Statute	12
Construction of Statute State Question	14
No Vested Rights in State Accident Fund	16
Remedy Only Not Right Involved	20
Police Power	31
CONCLUSION	34
APPENDIX	35

CASES CITED

Page

American Ry. Express Co. v. F. S. Royster Guano Co., 273 U. S. 274. 15
Arizona Employers' Liability Cases, 250 U. S. 400 31

Bandini Petroleum Co. v. Superior Court of State of California in and for Los Angeles County, 284 U. S. 8 15

Campbell v. Holt, 115 U. S. 620 ..... 12, 27
Chase Securities Corporation v. Donaldson, 65 S. Ct. 1137 ..... 12, 27
Choctaw Portland Cement Co., et al. v. Lamb, 79 Okl. 109, 110, 189 Pac. 750, 751 13
Copperweld Steel Co. v. Industrial Insurance Commission of Ohio, 143 O. S. 591 19

Dorchy v. State of Kansas, 272 U. S. 306 15

Ex parte Worcester County Nat. Bank of Worcester, 279 U. S. 347 .. 15

Ferguson Co. v. Seaman, 119 N. J. L. 575, 197 Atl. 245 26
Flournoy v. Wiener, 321 U. S. 253, 262 11

Gange Lumber Co. v. Rowley, et al., 122 Wash. Dec. 23 7
Georgia R. & E. Co. v. Decatur, 295 U. S. 165 15
Gregg Dyeing Co. v. Query, 286 U. S. 472 15
Guaranty Trust Co. v. Blodgett, 287 U. S. 509 15

Hanover Fire Ins. Co. v. Carr, 272 U. S. 494 15
Hicklin v. Coney, 290 U. S. 169 15

Keith v. Johnson, 271 U. S. 1 15

Lacoste v. Department of Conservation, 263 U. S. 545 31
Lane v. Department of Labor and Industries, 21 Wash. (2d) 420 .. 20

Matter of Vincent v. Allerton House Co., 177 N. E. 25, 256 N. Y. 522 ..... 21, 25
Mattson v. Department of Labor and Industries, 293 U. S. 151 8, 20, 23
Memphis & C. Ry. Co. v. Pace, 282 U. S. 241 15
Montgomery v. Seneca Iron & Steel Co., 257 N. Y. S. 556, 236 App. Div. 19 ..... 21, 25
Mountain Timber Company v. Washington, 243 U. S. 219 ..... 18, 31

New Amsterdam Casualty Co. v. Cardillo, 71 App. D. C. 172, 108 F. (2d) 492 ..... 20, 24
New York Central R. R. Co. v. White, 243 U. S. 188 31
Nickey v. State of Mississippi, 292 U. S. 393 15

CASES CITED—*Continued*

	Page
People ex rel. Bryant v. Zimmerman, 278 U. S. 63	11
Peramino Lumber Co. v. Marshall, 309 U. S. 370	20, 23
Powell v. Pennsylvania, 127 U. S. 678	31
Roe v. State of Kansas ex rel. Smith, 278 U. S. 191	15
Schmidt v. Wolf Contracting Co., 55 N. Y. S. (2d) 162	32
Smith v. Department of Labor and Industries, 8 Wash. (2d) 587	20
State ex rel. Griffin v. State Industrial Accident Commission, 145 Or. 443, 445, 28 Pac. (2d) 237	20, 23
State ex rel. Shuff v. Clausen, 131 Wash. 119	16
State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U. S. 270	15
State of Missouri ex rel. Hurwitz v. North, 271 U. S. 40	15
Stephenson v. Binford, 287 U. S. 251	15
Stertz v. Industrial Insurance Commission, 91 Wash. 588	18
Supreme Lodge, K. P. v. Meyer, 265 U. S. 30	15
Terrace v. Thompson, 263 U. S. 197	31
Thornton v. Duffy, 254 U. S. 361	15
Zadig v. Baldwin, 166 U. S. 485	11

STATUTES

	Page
Rem. Rev. Stat., Sec. 7676	16
Rem. Rev. Stat. Supp., Sec. 7676	17
Rem. Rev. Stat., Sec. 7679	21
Session Laws, 1911, subdivision (h), Section 5, Chapter 74	8, 35
Session Laws, 1927, subdivision (h), Section 4, Chapter 310	35
Laws of Washington, 1941, subdivision (h), Section 1, Chapter 209	8, 35
General Laws of Oregon, 1925, subdivision (c), Section 5, Chapter 133	36

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1945

NO. 53

GANGE LUMBER COMPANY, *Appellant*,

v.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLEE

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is *Gange Lumber Co. v. Rowley, et al.*, reported in 122 Wash. Dec. 234. However, the discussion of the merits is found in the previous opinion in the same case, 21 Wash. (2d) 420.

QUESTION PRESENTED

Is section 1, chapter 209, Laws of 1941, in violation of the due process and equal protection clauses of the Fourteenth Amendment?

The subdivision of the section of the statute involved is printed in full in the appendix as it now exists and as originally enacted and intervening amendments.

STATEMENT OF THE CASE

Appellant asserts that it has rights arising under the equal protection and due process clauses of the Fourteenth Amendment which were infringed by the enactment of subdivision (h) of section 1, chapter 209, Laws of 1941. Appellant's statement of the points to be relied upon required by Paragraph Nine of Rule Thirteen is:

> "Comes now the Appellant and adopts its Assignment of Error as its statement of the points to be relied up, * * *." (R., p. 88.)

Subdivision (h) of section 5, chapter 74 of Session Laws of 1911 (Appendix, p. 35) invested the department with continuing jurisdiction and without limitation of time for the reopening of claims and award of additional compensation should the disability become enlarged. In the recast of the section in 1927 (Appendix, p. 35) the legislature limited the time for judicial review of such departmental refusal to reopen to three years after the final closing of the claim. The amendment was reviewed upon appeal in *Mattson v. Department of Labor and Industries*, 293 U. S. 151. In the amendment now under attack (Appendix, p. 35) the right of judicial review is specifically extended to departmental action on applications to reopen in claims theretofore closed for more than five years.

Appellant "within due time" asserted that its rights under the due process and equal protection clauses of the Fourteenth Amendment were invaded by the statute in question, but the record is completely barren of any showing of any rights of the appellant. The Supreme Court of the State of Washington disposed of these several assignments of error by holding that no rights were involved and that the statute related solely to the remedy. The award of $460.50 is payable only from the accident fund of the State of Washington and not by the appellant, and its payment is in nowise dependent upon the continued existence of the appellant nor its continuance in operation, nor upon any future contributions by it to the accident fund of the State of Washington.

SUMMARY OF ARGUMENT

1. Is This Case Properly Here?

The Supreme Court of Washington decided that the appellant had no vested interest in the accident fund of the State of Washington out of which the award in question will be paid and that the statute in question merely affected the remedy and did not touch any right. If the statute thus construed does leave a Federal question it is unsubstantial upon the authority of *Chase Securities Corporation v. Donaldson*, 65 S. Ct. 1137.

2. Purpose of the Statute

The purpose of reopening provisions in workmen's compensation and industrial insurance acts is to avoid a complete adjudication of the award of compensation reserving continuing jurisdiction to allow additional compensation for an increase in the disability.

3. Construction of Statute State Question

The meaning placed upon a state statute by the highest court of the state is conclusive upon a review in the Supreme Court of the United States.

4. No Vested Rights in the Accident Fund

The accident fund of the State of Washington out of which the award in question will be paid is a state fund in which the appellant has no vested rights.

5. Remedy Not Right Involved

The 1941 amendment here drawn in controversy does not create a new right to recover additional compensation on account of the increase or aggravation of the original disability, but merely restores in part a remedy, that is, the right of judicial review in the event the Department of Labor and Industries refuses to allow such relief. The Department of Labor and Industries always possessed through the director continuing jurisdiction to reopen any claim irrespective of the length of time it had been closed should an increase of the disability result.

6. Police Power

The Workmen's Compensation Act of the State of Washington was passed in the legitimate exercise of the police power.

ARGUMENT

Is This Case Properly Here?

Previous counsel perhaps considered this case properly here when a stipulation was signed to include in the printed record excerpts from the appellant's brief in the Supreme Court of the state for the apparent purpose of showing jurisdiction, but briefs are not part of the record, *Zadig v. Baldwin*, 166 U. S. 485, and jurisdiction may not be estabIsihed by consent or acquiescence. *People ex rel. Bryant v. Zimmerman*, 278 U. S. 63. An independent Federal ground alone can confer jurisdiction, and even if a Federal question has been properly raised below, jurisdiction does not exist if the case was disposed of upon an independent state ground, or even if the decision rests in part upon a non-Federal ground adequate to support it and a Federal question determined which would otherwise be adequate to establish jurisdiction. *Flournoy v. Wiener*, 321 U. S. 253, 262.

The Supreme Court of Washington did not attempt to dodge the questions claimed by the appellate to violate its rights under the Fourteenth Amendment, but upon the contrary the court in its opinion, 122 Wash. Dec. 234 (R., p. 72), in a painstaking and careful effort set them out in full by adequate quotations from the appellant's brief. The court's opinion concludes that all questions were foreclosed by the original opinion:

> "No question of fact having been raised on this appeal, the only issues of law raised herein having been decided adversely to appellant's contention on the former appeal, it follows that the trial court correctly dismissed this action, as the trial court was bound by the law of the case as established by this court on the former appeal."

That the construction of the state statute by the highest court of the state is controlling is beyond argument. The conclusion of the Supreme Court of Washington that the appellant had no vested right in the accident fund is an independent state ground precluding consideration of the Federal questions urged by the appellant. The court below decided that the statute assailed dealt only with the remedy, which conclusion is established beyond doubt by the authorities discussed in subsequent divisions of this brief.

It may be claimed that the statute so construed and characterized by the highest court of the state leaves a residual Federal question that rights guaranteed appellant under the Fourteenth Amendment are violated by the amendment, but then the jurisdiction is left hanging by an extremely precarious thread and the reiteration of the conclusions in *Campbell v. Holt*, 115 U. S. 620, in *Chase Securities Corporation v. Donaldson*, 65 S. Ct. 1137, renders it unsubstantial.

Purpose of Statute

Most industrial insurance acts and workmen's compensation acts provide for a reopening and allowance of additional compensation and medical aid if, after the award of compensation, the disability is enlarged. It is profitable to consider the reason for such provisions. The common law measure of damages for personal injuries not only comprehends past and present pain, suffering and physical impairment but future pain, suffering and physical impairment as well. Although the courts adopted rules requiring the evidence of future pain, suffering and physical impairment to be reasonably certain, nevertheless, speculation inhered in the rule result-

ing in excessive awards in some instances and trivial or inconsequential awards in others, but the common law rule against splitting causes of action required a full, complete and final adjudication of all the rights and liabilities of the parties in a single action.

In the drafting of industrial insurance and workmen's compensation acts no such limitations were encountered. Compensation awards are for existing disabilities only. The tribunals administering such acts are commonly vested with continuing authority to award additional compensation for increase in the disability or, in the event the disability terminates or diminishes, to reduce or terminate the compensation. This permits a precise and accurate determination of the disability by actual development rather than forecasting of the future. While there are many cases in which the reasons for such provisions are adequately set forth, the Supreme Court of Oklahoma in *Choctaw Portland Cement Co., et al. v. Lamb*, 79 Okl. 109, 110, 189 Pac. 750, 751, aptly summarized the underlying philosophy as follows:

> "It is a well-known fact that the nature and probable effect of an injury, in many cases, cannot immediately be determined by the most proficient physicians or surgeons, and we are confident that the Legislature had this fact in mind when it provided in section 14, art. 4, for subsequent physical examinations, and conferred jurisdiction on the commission to modify or change its former findings or orders. The provision thus serves as a protection both to the employer and employe, and enables the commission to change its findings and orders to effectuate justice, where the amount previously awarded was either too large or too small, or where the commission had previously erred in fixing the compensation through mistake, or because of fraud practiced upon it. * * *"

In the original enactment of the Industrial Insurance Act of the State of Washington (Appendix, p. 35) no limit of time was placed upon the award of additional compensation for increased disability or change of condition, or the judicial review of such departmental orders, but in 1927 while the department's power to award additional compensation for an increase of disability or change of condition was left unchanged, a limitation of three years was imposed upon the right of judicial review of departmental action denying such award. In 1941 the legislature by the amendment in question (Appendix, p. 35) enlarged the time for judicial review to five years after the effective date of the amendment, which is December 2, 1942.

There was an adequate and well-founded reason for it. The war emergency provoked an acute shortage of labor. Many men with varying degrees of disability, who would be unemployable if an oversupply of labor was available, readily secured employment at substantial wages. Under such circumstances laboring men and women may sleep upon their rights and allow rights under the industrial insurance act to expire, or perhaps because of such employment might not be able to obtain additional compensation. When again there is an oversupply of labor such persons may very well become public charges. To guard against that situation the legislature exercised the police power and enlarged the remedy.

Construction of Statute State Question

The 4th Assignment of Error is as follows (R., p. 83):

"The Supreme Court of the State of Washington by its judgment erred in holding that the contributions or premiums exacted of an employer by the Workmen's Compensation Act of the State of

Washington and paid by the employer into the accident fund maintained by the appellee Department of Labor and Industries of said State are a license or excise tax."

That assignment is without merit because the construction placed upon a state statute by the highest court of a state is completely binding upon the Supreme Court of the United States and this tribunal takes the statute as though it read precisely as the highest court in the state had interpreted it.

State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U. S. 270;

Supreme Lodge, K. P. v. Meyer, 265 U. S. 30;

Guaranty Trust Co. v. Blodgett, 287 U. S. 509;

Hicklin v. Coney, 290 U. S. 169;

Georgia R. & E. Co. v. Decatur, 295 U. S. 165;

Stephenson v. Binford, 287 U. S. 251;

Bandini Petroleum Co. v. Superior Court of State of California in and for Los Angeles County, 284 U. S. 8;

Hanover Fire Ins. Co. v. Carr, 272 U. S. 494;

Dorchy v. State of Kansas, 272 U. S. 306;

Roe v. State of Kansas ex rel. Smith, 278 U. S. 191;

Ex parte Worcester County Nat. Bank. of Worcester, 279 U. S. 347;

Memphis & C. Ry. Co. v. Pace, 282 U. S. 241.

Nickey v. State of Mississippi, 292 U. S. 393;

State of Missouri ex rel. Hurwitz v. North, 271 U. S. 40;

Keith v. Johnson, 271 U. S. 1;

Gregg Dyeing Co. v. Query, 286 U. S. 472;

American Ry. Express Co. v. F. S. Royster Guano Co., 273 U. S. 274;

Thornton v. Duffy, 254 U. S. 361.

No Vested Rights in State Accident Fund

The accident fund, created by Sec. 7676, Rem. Rev. Stat. of Washington, provides.

> "* * * The fund thereby created shall be termed the 'accident fund' which shall be devoted to the purpose specified for it in this act."

and the legislature has exclusive control over it and no moneys may be paid from it without a legislatvie appropriation pursuant to Section 4 of Article VIII of the State Constitution. *State ex rel. Shuff v. Clausen*, 131 Wash. 119.

The award of $460.50 is payable only from the accident fund of the State of Washington and its payment is in nowise dependent upon the continued existence of the appellant nor the continuance of its payment of premiums, if, in fact, it is presently a contributor. No evidence was adduced in any of the proceedings below. The only claim in the record is in Paragraph Seven in the application of the Gange Lumber Company addressed to the Joint Board of the Department of Labor and Industries (R., p. 31):

> "7. That, notwithstanding the aforesaid decision of the Supreme Court of the State of Washington, the 1941 Act, as interpreted by said Supreme Court as aforesaid, and said order of the Supervisor of Industrial Insurance dated November 25, 1944 entered pursuant thereto, insofar as said Act and order provide for an award to the claimant although his right to apply for or receive such an award had once (fol. 35) become barred, and insofar as said Act and order require the amount of such award to be charged to your petitioner's cost experience under said Workmen's Compensation Act, constitute a taking of the property of your petitioner without due process of law and deny your petitioner the equal protection of the laws in violation of the Fourteenth

Amendment to the Constitution of the United States and are void."

The record is completely silent as to whether or not appellant is now engaged in any extrahazardous occupation in the State of Washington as a result of which it is obliged to contribute to the accident fund, and there is no showing that appellant has any intention of so engaging in the future, and specifically there is no allegation that it will be in operation in the month of September following the final payment of this award.

The payment when made may possibly be one factor in determining the appellant's future premium rate, but there is no showing of it in the record. For ought that appears therein, if it is a contributor it may already be over the maximum rate and not be affected by any further awards. The award can in nowise increase the rate of appellant's industrial insurance premiums until the September following the payment. In no event however is there any requirement that the appellant pay Rowley's award or even that it contribute towards the payment of it. The award is payable solely from the accident fund. The applicable provision of the statute is found in Sec. 7676, Rem. Rev. Stat., Supp., of Washington:

> "The actual premium rate which any employer shall be required to pay for the accident fund shall be forty per cent (40%) of the basic rate, plus sixty per cent (60%) of the employer's cost rate for each workman hour reported by him during each fiscal year over the five-year period next preceding the then last September first, but in no case shall the total rate exceed one hundred sixty per cent (160%) of the basic rate."

The Industrial Insurance Act of the State of Washington creates a compulsory state monopoly. All awards

are paid from the accident fund. *The employer is not even a party.* It was characterized by the Supreme Court of Washington in *Stertz v. Industrial Insurance Commission*, 91 Wash. 588, as follows:

> "To resume, ours is not an employer's liability act. It is not even an ordinary compensation act. It is an industrial insurance statute. Its administrative body is entitled the industrial insurance commission. All the features of an insurance act are present. Not only are all remedies between master and servant abolished, and, in the words of the statute, all phases of them withdrawn from private controversy, but the employee is no longer to look to the master even for the scheduled and mandatory compensation. He must look only to a fund fed by various employers. When the employer, for his part, pays his share into this fund, all obligation on his part to anybody is ended. Let a claim be rejected by the commission, the latter and not the employer is to be sued. Nor is the commission so much as selected by the parties. The state administers the fund. Few foreign countries had yet adopted a scheme so comprehensive. Germany alone furnished a precedent. In subsequent legislation in this country only one or two states have adopted this principle and none have pushed it so far."

This court in *Mountain Timber Company v. Washington*, 243 U. S. 219, likewise noticed the same characteristics:

> "The act establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recovert damages on the ground of negligence, and deprives the courts of jurisdiction over such controversies. It is obligatory upon both employers and employees in the hazardous employments, and the state fund is maintained by compulsory contributions from employers in such industries, and is made the sole source of compensation for injured employees and

for dependents of those whose injuries result in death. * * *

"From this recital it will be clear that the fundamental purpose of the act is to abolish private rights of action for damages to employees in the hazardous industries * * * and to substitute a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion of the hazard of each class of occupation."

And in the opinion below the court said:

"The fact that an employer has a right to appear and contest a claim of an injured workman and to take an appeal from an adverse decision, does not give him any right in or to the accident fund, and we have never held that he has any so-called vested right therein. The reason he may contest a claim is that his cost experience would be affected by an unlawful use of the fund. When it is finally decided that a claimant is entitled to compensation, all further interest on the part of the employer ceases, and all procedual and administrative questions are of no concern of his, but lie only between the claimant and the department." (21 Wash. (2d) 427.)

and further:

"The lapse of time limitation does not build up any immunity in favor of the employer or bring into being any vested right that can be affected if the time limitation is changed." (21 Wash. (2d) 429.)

Ohio likewise has a compulsory state monopoly industrial insurance system which was similarly characterized by the Supreme Court of Ohio in *Copperweld Steel Co. v. Industrial Insurance Commission of Ohio*, 143 O. S. 591. That case was subsequently here upon review but the court found it unnecessary to deal with this aspect of the situation (*Copperweld Steel Co. v. Industrial Insurance Commission of Ohio*, decided April 23, 1945, No. 684, October Term, 1944, 65 S. Ct. 1006).

Fundamentally, before any rights of the appellant can be invaded by the statute in question it must have a vested interest in the fund, but it is exclusively a state fund subject to the control of the legislature for the purposes specified in the industrial insurance act. If the award in question were to be paid by the appellant an entirely different question would be encountered. Only the accident fund of the State of Washington is involved in which the appellant has no vested interest. All appellant's obligations to its employees are extinguished by the payment of its premiums.

Remedy Only Not Right Involved

The 1941 amendment here drawn in controversy does not create a new right to recover additional compensation on account of the increase or aggravation of the original disability, but merely restores in part a remedy, that is, the right of judicial review in the event the Department of Labor and Industries refuses to allow such relief. The Department of Labor and Industries always possessed through the director continuing jurisdiction to reopen any claim irrespective of the length of time it had been closed should an increase of the disability result.

Mattson v. Department of Labor and Industries, 293 U. S. 151;

Peramino Lumber Co. v. Marshall, 309 U. S. 370;

New Amsterdam Casualty Co. v. Cardillo, 71 App. D. C. 172, 108 F. (2d) 492;

Lane v. Department of Labor and Industries, 21 Wn. (2d) 420;

Smith v. Department of Labor and Industries, 8 Wn. (2d) 587;

State ex rel. Griffin v. State Industrial Accident Commission, 145 Or. 443, 445, 28 Pac. (2d) 237;

Matter of Vincent v. Allerton House Co., 177 N. E. 25, 256 N. Y. 522;

Montgomery v. Seneca Iron & Steel Co., 257 N. Y. S. 556, 236 App. Div. 19.

Under subdivision (h) of Sec. 7679, Rem. Rev. Stat. of Washington, an injured workman could always have his claim for compensation reopened and additional compensation awarded if the disability became worse, and the department always had the power to reopen a closed claim and award additional compensation under such circumstances, but the right of judicial review of such refusal was withdrawn in 1927 if the claim had been closed more than three years. The amendment in question restores the right of judicial review of departmental refusal of such relief on all closed claims for a period of five years from the effective date of the amendment.

Appellant constantly reasserts that the statute in question revives claims theretofore barred. This is unfounded. The court below reiterated that the remedy only is involved. The decisions of the Supreme Court of the State of Washington construing the statute in question hold that the right always existed but that in recasting the section in 1927 and 1929 the legislature merely withdrew the remedy.

Specifically, in *Smith v. Department of Labor and Industries*, 8 Wn. (2d) 587, it was determined that the right to have a claim reopened always existed even prior to the amendment now under attack. When a three-year limitation existed as to the remedy it was held that the director might at any time reopen a claim, notwithstanding the fact that it had been closed for more than three years. In the course of that opinion Mr. Justice Millard, speaking for a unanimous court, said:

"The Washington Legislature conferred continuing jurisdiction upon the Director of Labor and Industries so that he may at any time upon his own motion grant additional compensation to an injured workman, if he finds that there has been, in fact, an aggravation of the injury."

In addressing itself to this aspect of the question the court below in the instant case said:

"The other type of statute is one which relates only to the remedy and has nothing to do with any right or obligation, does not inhere in either, and is wholly independent of them. It is a statute of limitations in its strict sense and, although a remedy may become barrer thereunder, the right or obligation is not extinguished. It is a statute of repose."

* * * * * * * * * * *

"The employer has never had anything to say about when a claim for aggravation of injury may be made, and the fact that after sixteen years of operation of the law the legislature decided to require the injured workman claiming aggravation to make his claim within a limited time, did not change the status of the employer with reference to the accident fund. It did not thereby create a statute of nonclaim. It merely affected the remedy of the injured workman. It was enacted for the benefit of the department so that it would not have to consider stale claims, when perhaps the securing of evidence as to their merit might be difficult or impossible. The claim of the workman is not one against the employer and the limitation period was not made for the employer's benefit.

"The limitation periods fixed by the acts of 1927, 1929 and 1941 have no relation to the right to a readjustment of compensation created by the act of 1911, and do not inhere therein, but relate only to the remedy of the claimant. * * *" (21 Wn. (2d) 426, 428.)

That decision demonstrates that no right is involved by the amendment now under attack, for had the legislature not enacted the challenged amendment the director,

nevertheless, has the power to reopen this and every other case and award additional compensation no matter when closed. The statute did not revive a dead claim.

The same conclusion was reached under an almost identical statute (Appendix, p. 36) in *State ex rel. Griffin v. State Industrial Accident Commission*, 145 Or. 443, 445, 28 Pac. (2d) 237:

> "Construing the Workmen's Compensation Act in its entirety, it is apparent that the legislature in passing it, and the electorate in approving it, did not intend to deprive the commission of the right to readjust or terminate compensation to the injured workman when his condition had changed, subsequent to the commission's award or the judgment of the court."

In the decision now under review, the Supreme Court of Washington held that the statute in question did not disturb any vested right of the appellant under the United States Constitution, but dealt with the remedy only. This court reached the same conclusion concerning a prior amendment of the same section in *Mattson v. Department of Labor and Industries*, 293 U. S. 151:

> "* * * The section under attack merely limits the time for the assertion of the right, affects the remedy only, and that in a manner not unreasonable, arbitrary or oppressive. Such a limitation of time within which appellant's remedy must be pursued does not deprive him of due process."

Peramino Lumber Co. v. Marshall, 309 U. S. 370, is quite significant. In that instance five years after the compensation award became final Congress passed a private act authorizing further proceedings. The issue was summarized in the following paragraph:

> "By direct appeal the appellants challenge the decree below, contending that the private act violates the due process clause of the Fifth Amendment. The

argument of appellants is that the original award was an adjudication on which further review was barred prior to the enactment of the private act; that thereby rights and obligations were finally determined, the deprivation of which took from appellants a substantive immunity from further claims of Clark and created in Clark new substantive rights."

The court rejected those arguments and concluded:

"An award under the Longshoremen's and Harbor Workers' Compensation Act determines the liability of employer to employee. But we do not agree that the immunity obtained by the lapse of the time for review is the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim. This private act does not set aside a judgment, create a new right of action or direct the entry of an award. The hearing provided for is subject to the provisions of the general act for longshoremen's and harbor workers' compensation. It does not operate to create new obligations where none existed before. It is an act to cure a defect in administration developed in the handling of a compensable claim. If the continuing injury had been known during the period of compensation, payments of the same amount due under the award authorized by this act would have been due to the employee. In such circumstances we see no violation of the due process clause."

The United States Court of Appeals for the District of Columbia in *New Amsterdam Casualty Co. v. Cardillo*, 71 App. D. C. 172, 108 F. (2d) 492, considered a very similar question arising under the Longshoremen's and Harbor Workers' Act. That court concluded:

"* * * We think, in this view, that the passage of the amendment neither creates new, nor destroys old rights. It applies only to the remedy, and from its date it permits the deputy to enlarge or diminish the former award to meet the circumstances of a particular case. We think Congress had the power to extend or to contract the period of limi-

tation as applicable to an indemnity claim either pending or subsequently brought. * * *"

The same conclusion was reached by the New York Court of Appeals in the *Matter of Vincent v. Allerton House Co.*, 177 N. E. 25, 256 N. Y. 522:

"* * * After the accident and injury had occurred, subdivision 6-a was added to the law. It reads: 'The board may, within one year from the date of accident, upon its own motion, or on application of any party in interest, reclassify a disability upon proof that there has been a change in condition, or that the previous classification was erroneous and not in the interest of justice.' (Laws of 1927, ch. 557, in effect July 1st, 1927.) This subdivision was effective to forbid reclassification unless made within one year of the occurrence of the accident. *(Matter of Schaefer v. Buffalo Steel Car Co., supra.)* In this instance the reclassification was not made within the time fixed. We think that this subdivision was intended to have application, in respect to a reclassification of all injuries, whether previously or subsequently occurring; that it affected the remedy and not the right; that it was applicable to the case of this claimant. Therefore, the Board had no power to make the award in question."

The Appellate Division of the Supreme Court of New York elaborated upon that view in *Montgomery v. Seneca Iron & Steel Co.*, 257 N. Y. S. 556, 236 App. Div. 19:

"It is conceded that subdivision 6-a is retroactive (*Matter of Vincent v. Allerton House Co., supra*), and that the 1931 amendment is applicable to accrued as well as to future claims. It is argued, however, that it does not revive claims which were already extinguished, citing *Hopkins v. Lincoln Trust Co.*, 233 N. Y. 213, 135 N. E. 267; *County of Erie v. Lowenstein*, 235 N. Y. 458, 139 N. E. 573; *Orton v. Olds Motor Works*, 229 App. Div. 46, 240 N. Y. S. 570. We are not here dealing with the revival of a right or claim which has been extinguished, but simply with a power of the board to afford a specific remedy within three years of the date of accident because one

year was found by the Legislature to be inadequate for the just determination of a disability classification. The original subdivision 6-a was held to affect 'the remedy and not the right,' and 'was intended to have application in respect to a reclassification of all injuries, whether previously or subsequently occurring.' *Matter of Vincent v. Allerton House Co., supra.* It is logical to assume that the 1931 amendment was intended to have like applicability to all injuries. The Legislature had the power to so apply it. 'No right is destroyed when the law restores a remedy which had been lost.' *Campbell v. Holt,* 115 U. S. 620, 628, 6 S. Ct. 209, 213, 29 L. Ed. 483. See, also, *Robinson v. Robins Dry Dock & Repair Co.,* 238 N. Y. 271, 144 N. E. 579, 36 A. L. R. 1310. * * *"

The New Jersey Court of Errors and Appeals in *Ferguson Co. v. Seaman,* 119 N. J. L. 575, 197 Atl. 245, was called upon to consider the statute of that state providing for a review of a formal award for increased incapacity enacted after award of compensation. The claim was made that the amendment violated the due process and equal protection clauses of the Fourteenth Amendment which view was rejected. The court said:

"And so the amendment in question affects the remedy merely. Such a proceeding necessarily relates back to the original injury; it is designed to adjust the formal award to accord with an increase or diminution of the incapacity flowing from that injury, and thus to make effective the statutory policy of compensation for the full disability—neither more nor less. This liability for compensation for the entire consequent incapacity, including any subsequent increase thereof, was basic in the statute as it then existed; and the amendment, in substance and effect, constituted but an extension—in harmony with the provisions relating to informal awards—of the time for bringing action to recover the compensation for such disability. It merely extended the time for the commencement of action to recover for the increased disability beyond the entry of the formal award.

"* * * But the statutory liability of the employer nevertheless comprehends compensation for the entire disability, within the fixed maximum. And the amendment, in furtherance of that policy, permits of a modification in consonance with the subsequent increase or diminishment of incapacity. There is no enlargement of the primary statutory liability; no new or additional burden is imposed. That was known to be the employer's obligation when he elected to accept the provisions of section II of the statute. The amendment was simply a regulation of the procedure to subserve the statutory policy—to insure the payment of the compensation prescribed for the actual period of disability, but no more. The employer has no constitutional or vested right to the maintenance of a procedural system that in some cases works a denial of the prescribed compensation, especially where there is made available to him a correlative remedy against the payment of compensation when disability has ceased. To hold that the employer cannot be called upon for compensation for increased disability after a formal award is to bestow upon the employe the reciprocal right to a continuance of compensation payments after such an award, even though disability has ended. And this would run counter to the spirit of the enactment."

In *Chase Securities Corporation v. Donaldson*, decided May 21, 1945, No. 110 October Term, 1944, 65 S. Ct. 1137, this court was called upon under the Fourteenth Amendment to determine the validity of a Minnesota statute lifting the bar of the statute of limitations in an action under the Blue Sky Law. Like the Supreme Court of Washington did in this instance, the Supreme Court of Minnesota relied upon *Campbell v. Holt*, 115 U. S. 620, and observed that it was a controlling exposition of the limitations imposed by the Fourteenth Amendment upon state laws. On appeal in the Supreme Court of the United States the appellant strenuously argued that *Campbell v.*

Holt, supra, should be overruled but the court declined. The matter is now settled. The full discussion of the constitutional question in the opinion is:

"The substantial federal questions which survive the state court decision are whether this case is governed by *Campbell v. Holt* and if so, whether that case should be reconsidered and overruled.

"In *Campbell v. Holt, supra,* this Court held that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar. This has long stood as a statement of the law of the Fourteenth Amendment, and we agree with the court below that its holding is applicable here and fatal to the contentions of appellant.

"Appellant asks that in case we find *Campbell v. Holt* controlling it be reconsidered and overruled We are reminded that some state courts have not followed it in construing provisions of their constitutions similar to the due process clause. Many have, as they are privileged to do, so interpreted their own easily amendable constitutions to give restrictive clauses a more rigid interpretation than we properly could impose upon them from without by construction of the federal instrument which is amendable only with great difficulty and with the cooperation of many States.

"We are also cited to some criticism of *Campbell v. Holt* in legal literature. But neither in volume nor in weight are they more impressive than has been directed at many decisions that deal with controversial and recurrent issues.

"Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law. There has been controversy as to their effect. Some are of opinion that like the analogous civil law doctrine of prescription limitations statutes should be viewed as extinguishing the claim and destroying the right itself. Admittedly it is troublesome to sustain

as a 'right' a claim that can find no remedy for its invasion. On the other hand, some common-law courts have regarded true statutes of limitation as doing no more than to cut off resort to the courts for enforcement of a claim. We do not need to settle these arguments.

"Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

"This Court, in *Campbell v. Holt*, adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value. The contrast between the acceptable result of the reasoning of *Campbell v. Holt* and its rather unsatisfactory rationalization was well pointed out by Mr. Justice Holmes when as Chief Justice of Massachusetts he wrote:

" 'Nevertheless in this case, as in others, the pre-

vailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds. Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power. *Camfield v. United States*, 167 U. S. 518, 523, 524. But, however that may be, multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small.' *Danforth v. Groton Water Co.*, 178 Mass. 472, 476. This statement was approved and followed by the New York Court of Appeals in *Robinson v. Robins Dry Dock and Repair Co.*, 238 N. Y. 271.

"The essential holding in *Campbell v. Holt*, so far as it applies to this case, is sound and should not be overruled. The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Some rules of law probably could not be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin. Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment. Nor has the appellant pointed out special hardships or op-

pressive effects which result from lifting the bar in this class of cases with retrospective force. This is not a case where appellant's conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it sold unregistered stock depending on a statute of limitation for shelter from liability. The nature of the defenses shows that no course of action was undertaken by appellant on the assumption that the old rule would be continued. When the action was commenced, it no doubt expected to be able to defend by invoking Minnesota public policy that lapse of time had closed the courts to the case, and its legitimate hopes have been disappointed. But the existence of the policy at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy before final adjudication. Whatever grievance appellant may have at the change of policy to its disadvantage, it had acquired no immunity from this suit that has become a federal constitutional right. The judgment is affirmed."

Police Power

In the opinion below (21 Wn. (2d) 420) the Supreme Court of Washington specifically declared that the amendment in question was enacted under the inherent police power of the state.

It is established that the Fourteenth Amendment does not prohibit a legitimate exercise of the police power.

Powell v. Pennsylvania, 127 U. S. 678;

Lacoste v. Department of Conservation, 263 U. S. 545;

Mountain Timber Co. v. Washington, 243 U. S. 219;

New York Central R. R. Co. v. White 243 U. S. 188;

Terrace v. Thompson, 263 U. S. 197;

Arizona Employers' Liability Cases, 250 U. S. 400.

A much stronger case—a case in which one might justifiably say that rights were involved—has arisen in

the State of New York. The legislature recognized that during the war emergency the cost of living materially increased and increased the compensation schedule. It was urged that such increase so far as pending cases were concerned was void in consequence of the constitutional provisions of the Federal and State Constitutions. The views expressed in that opinion are particularly pertinent and in discussing the constitutional questions the court said (*Schmidt v. Wolf Contracting Co.*, 55 N. Y. S. (2d) 162):

"Even if it be assumed that liability under the Workmen's Compensation Law is contractual, the amendment is not thereby violative of the provisions of the Constitution of the United States. The police power of the state may be exercised to affect the due process of law clause as well as the impairment of contract clause of the Federal Constitution.

"The subject matter of workmen's compensation reposes within the control of the Legislature."

* * * * * * * * * *

"The constitutional prohibition that no state shall pass any law which shall deprive a person of life, liberty or property without due process is not absolute. *Matter of People v. Title & Mortgage Guarantee Co. of Buffalo*, 264 N. Y. 69, 190 N. E. 153, 96 A. L. R. 297; *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. R. 1481."

* * * * * * * * * *

"The amendment in question was enacted in the exercise of the police power of the state and hence violates neither its constitution nor the Federal Constitution. The principle of workmen's compensation is the promotion of public good. *Matter of Petrie, supra; Matter of Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158; *New York Central R. Co. v. White*, 243 U. S. 188, 37 S. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629.

"In the case of *Guttag v. Shatzkin*, 230 N. Y. 647, at page 650, 130 N. E. 929, at page 930, the court said:

"'While the states are subject to the contract clause of section 10, article 1 and section 1, article 14, of the United States Constitution, the police power of the states may affect contracts and modify property rights without violation of these provisions. Conceding the health, safety, and morals of its citizens to be involved, and the circumstances to justify a proper interference by the state, neither the contract nor due process of law clause stand in the way. *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1428. These sections of our federal Constitution and the police power of the states harmonize and never conflict. The only question here is one of fact, not one of law: Do the facts call into existence the power reserved to the states to legislate for the safety and health of the people? Within its sphere the police power of the states is not unlike the war power of the nation. Both are rules of necessity, impliedly or expressly existing in every form of government; and the one to preserve the health and morals of a community; the other to preserve sovereignty.'"

CONCLUSION

The statutory amendment under attack by the appellant in this case does not revive any dead claims. The department always had and now has full statutory authority to reopen any case whenever closed and award whatever additional compensation it believes warranted. The statute merely enlarged or restored the right of judicial review of departmental denial of such an application for additional compensation. The appellant has no vested rights in the accident fund and the statute deals only with the remedy and, therefore, disturbs no rights.

Olympia, Washington, September 24, 1945.

Respectfully submitted

SMITH TROY,
Attorney General of the State of Washington,

HARRY ELLSWORTH FOSTER,
Special Assistant Attorney General of the State of Washington,

Counsel for Appellee, Department of Labor and Industries.

APPENDIX

Subdivision (h), section 5, chapter 74, Session Laws, 1911:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments."

Subdivision (h), section 4, chapter 310, Session Laws, 1927:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided*, Any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment."

Subdivision (h), section 1, chapter 209, Laws of Washington, 1941:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the Director of Labor and Industries, through and by means of the Division of Industrial Insurance, may, upon the application of the beneficiary, made within five

years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided,* Any such applicant whose compensation has heretofore been established or terminated shall have five (5) years from the taking effect of this act within which to apply for such readjustment."

Subdivision (c), section 5, chapter 133, General Laws of Oregon, 1925:

"(c) *Rearrangement of Compensation.* If subsequent to the last award or arrangement of compensation by the commission there has been an aggravation of the disability resulting from an accidental injury, the injured workman shall file with the commission an application for increased compensation, which application shall set forth sufficient facts to show an aggravation in such disability and the degree thereof. Any application for increased compensation for aggravation must be filed within one year from the date of the first award of compensation to the claimant: No increase or rearrangement in compensation shall be operative for any period prior to the application therefor. However, the power and jurisdiction of the commission shall be continuing, and it may, upon its own motion only, from time to time make such modification or change with respect to former findings, orders or awards as in its opinion may be justified, but no appeal from or review of such proceedings shall be had."

OCT 8 1945
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 53

GANGE LUMBER COMPANY,

Appellant,

—vs.—

RALPH ROWLEY AND DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE RALPH ROWLEY

JAY C. ALLEN,
CHARLES R. CAREY,
Attorneys for Appellee Rowley

719 2nd Ave. Building
Seattle 4, Washington

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 53

GANGE LUMBER COMPANY,

Appellant,

—vs.—

RALPH ROWLEY AND DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE RALPH ROWLEY

JAY C. ALLEN,
CHARLES R. CAREY,
Attorneys for Appellee Rowley

719 2nd Ave. Building
Seattle 4, Washington

INDEX

	PAGE
I. OPINION BELOW	1
II. THE QUESTIONS INVOLVED IN THIS APPEAL	1
III. STATEMENT OF THE CASE	2
IV. POSITION OF APPELLEE ROWLEY	4
V. SUMMARY OF ARGUMENT	5
VI. ARGUMENT	6
1. The 1941 "Aggravation Clause" is Constitutional and Does Not Constitute the Taking of Appellant's Property Without Due Process of Law	6
2. The Washington Workmen's Compensation Act and the "Aggravation Clause" is Strictly Remedial in Character, and the Shortening or Lengthening of the Statute in Question Only Affects the Remedy and Not the Right	8
3. The Precise Question has Heretofore Been Previously Decided by the Supreme Court of the United States in *Mattson v. Department Case, Campbell v. Holt* and *Chase Securities Corporation v. Donaldson*	23
(A) *The Mattson Case*	23
(B) *Campbell v. Holt*	25
(C) *Chase Securities v. Donaldson, supra*	27
4. The Workmen's Compensation Act and "Aggravation Clause" is a Proper Exercise of the Police and Sovereign Powers of the State and Federal Constitutions and Amendments Thereto and is Not Unreasonable, Arbitrary or Oppressive, and Appellant Has No Vested Interest Therein	29

TABLE OF CASES

PAGE

Barbier v. Connolly, 113 U.S. 27, 31 31

Beels v. Department of Labor and Industries, 178 Wash. 301, 34 P. (2d) 917 11

Campbell v. Holt, 115 U.S. 620, 6 S. Ct. 209, 29 L. Ed. 483 ..... 5, 7, 11, 12, 13, 14, 16, 17, 22, 23, 25, 26

Chase Securities Corporation v. Donaldson, ... U. S. ....., 89 L. Ed. (No. 15) 1109, 1113 ..... 5, 7, 23, 27

Chelentis v. Luckenbach Steamship Co. Inc. 247 U. S. 372 10

Danzer & Co. v. Gulf & S. I. R. Co., 268 U.S. 633, 45 S. Ct. 612, 60 L. Ed. 1126 ..... 16, 26

Denning v. Quist, 160 Wash. 681, 296 Pac. 145, and 172 Wash. 83, 19 P. (2d) 656 ..... 7, 19, 20

Earle v. Froegtert Grain & Malting Co., 197 Wash. 341, 85 P. (2d) 264 16

Ferguson v. Department of Labor and Industries, 168 Wash. 677, 13 P. (2d) 39 7

Fisher Flouring Mills Co. v. Brown, 109 Wash. 680, 187 Pac. 399 30

Gange Lumber Co. v. Rowley, et al., 122 Wash. Dec. 234, 155 P. (2d) 802 1

Herr v. Schwager, 145 Wash. 101, 258 Pac. 1039 ..... 11, 16, 17, 26

Hilding v. Department of Labor and Industries, 162 Wash. 168 22

Kidd v. Pearson, 128 U.S. 1, 26 31

Lane v. Department of Labor and Industries, 21 Wash. (2d) 420, 151 P. (2d) 440 ..... 14, 26, 27, 32, 33, 34

Lawton v. Steele, 152 U.S. 133, 136 31

Mattson v. Department of Labor and Industries, 176 Wash. 345, 29 P. (2d) 675; 293 U.S. 151 ..... 2, 5, 6, 18, 22, 23, 32, 35

Monroe Logging Company v. Department of Labor and Industries, 21 Wash. (2d) 800, 153 P. (2d) 511 34

TABLE OF CASES—Cont.

PAGE

Mountain Timber Co. v. State of Washington, 75 Wash. 581, affirmed, 243 U.S. 219 ..... 30, 33
Nelson v. Department of Labor and Industries, 9 Wash. (2d) 621, 115 P. (2d) 1014 22
Peeples v. Hayes, 4 Wash. (2d) 253, 104 P. (2d) 305 16
Raymond Lumber Co. v. Raymond Light & Water Co., 92 Wash. 330, 159 Pac. 133 32
Reeder v. Crewes, 199 Wash. 40, 90 P. (2d) 267 21
Robinson v. McHugh, 158 Wash. 157, 291 Pas. 330, and 160 Wash. 703, 295 Pac. 921 ..... 7, 19, 20
Rowley v. Department of Labor and Industries, 21 Wash. (2d) 420, 151 P. (2d) 440 1
Schmeiling v. Department of Labor and Industries, 167 Wash. 692, 10 P. (2d) 229 7
Seattle v. DeWolfe, 17 Wash. 349, 49 Pac. 553 16
Seattle v. Gervasi, 144 Wash. 429, 259 Pac. 328 30
Shea v. Olson, 185 Wash. 143, 53 P. (2d) 615 ..... 30, 32
State v. Buchanan, 29 Wash. 602, 70 Pac. 52, 92 Am. St. 930, 59 L.R.A. 342 14
Smith v. Department of Labor and Industries, 8 Wn. (2d) 587, 113 P. (2d) 57 18
State v. Vinther, 176 Wash. 391, 29 P. (2d) 693 34
State ex rel. Crabb v. Olinger, 196 Wash. 308, 82 P. (2d) 865 ..... 22, 34
State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101 ..... 30, 33, 34
State ex rel. Davis-Smith Co. v, Washington, 243 U. S. 219, 61 L. Ed. 685, 37 S. Ct. 260 34
State ex rel. Lane v. Fleming, 129 Wash. 646, 255 Pac. 647 30
Tioga Railroad v. Blossburg and Corning Railroad, 20 Wash. 137, 150 13
Whitaker v. Green River Coal Co., 122 S.W. (2d) 1012 31

TEXTBOOKS

PAGE

Bouvier, Law Dictionary, Vol. 2 (14th Ed.), 484 and 436 ..... 9, 10

STATUTES

PAGE

Laws of Washington, 1911, Ch. 74 ..... 2, 19, 20, 25, 28, 29, 32, 33, 37, 38
Laws of Washington, 1927, Ch. 310, § 4 ..... 2, 6, 7, 17, 18, 25, 28, 38, 39
Laws of Washington, 1929, Ch. 132, § 2 ..... 20, 28
Laws of Washington, 1931, page 263 ..... 20, 21
Laws of Washington, 1941, Ch. 209, § 1 ..... 1, 3, 6, 8, 18, 28, 39
Remington's Revised Statutes of Washington:
§ 7675 20
§ 7679 11
§ 7686 11
§ 7697 ..... 20, 21

CONSTITUTIONS

PAGE

Washington State Constitution, Art. I 32
United States Constitution:
5th Amendment 2, 5
14th Amendment 2, 5, 12, 14, 24, 27, 31, 32, 36
Article I, § 10 7
§ 3 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 53

GANGE LUMBER COMPANY,

Appellant,

—vs.—

RALPH ROWLEY AND DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE RALPH ROWLEY

OPINION BELOW

The Opinion of the Supreme Court of the State of Washington from which this appeal has been taken is set forth in 122 Wash. Dec. (No. 8) 234, 155 P. (2d) 802, although the questions herein presented were first considered on appeal by the same Court in 21 Wash. (2d) 420, 151 P. (2d) 440.

I.

THE QUESTION INVOLVED IN THIS APPEAL

Does the enactment of Subdivision (h) of Section 1, Chapter 209, Laws of 1941, by the Legislature and

Electorate of the State of Washington, violate the 5th and 14th Amendments to the Constitution of the United States?

II.

STATEMENT OF THE CASE

In 1911 the Legislature of the State of Washington, acting under its Constitutional police and sovereign powers, enacted Chapter 74, Laws of 1911, creating what is commonly known as "The Washington Workmen's Compensatoin Aet," and in paragraph (h), Section 5 thereof, placed no restriction on the time in which a workman could apply for the reopening of his claim for "AGGRAVATION" once his compensation had been established. (See Appendix, page 38.) Thereafter the Act was amended by successive Legislatures in 1913, 1915, 1917, 1919 and 1923, without changing the "AGGRAVATION CLAUSE."

However in 1927 the Washington Legislature for the first time amended the "AGGRAVATION CLAUSE" and imposed a limitation of three years from the effective date of the Amendment in which an applicant, whose claim had heretofore been established or terminated, could apply foe readjustment (AGGRAVATION) and reopening of his claim. (Appendix, page 38.) The Constitutionality of the Act was challenged by the injured workman as being in contravention of the 5th and 14th Amendments to the Federal Constitution, but this Court in *Mattsen v. De-*

partment of Labor and Industries, 176 Wash. 345, 29 P. (2d) 675, 293 U.S. 151, held that the limitation imposed did not violate the claimant's constitutional rights. The same "Aggravation Clause" was reenacted in 1929 without change.

Appellee Rowley was injured on July 13, 1937, while in the employ of appellant and was paid $307.50 for permanent partial disability. His claim was closed March 9, 1938, and no appeal was taken from such order. The 3 year "AGGRAVATION CLAUSE" was in effect at that time.

In 1941, the Washington Legislature amended the Act by greatly increasing the benefits to injured workmen in conformity with economic conditions, and increased the time in which a claimant could apply for reopening of this claim because of "AGGRAVATION" from three to five years from the effective date of the Act. Referendum proceedings were instituted by the employers and upon the voters approving the Amendment, the Act finally became effective December 3, 1942. (Appendix, page 39.)

On March 19, 1943, Appellee Rowley filed his application for reopening on the ground of "AGGRAVATION" (his claim being previously closed). The five year "AGGRAVATION CLAUSE" was then in effect. Rowley was allowed $460.50 additional permanent partial disability compensation for his "AGGRAVATION" by virtue of two Washington Supreme Court

decisions in his favor. The entire question presented to this Court is whether or not the 1941 "AGGRAVATION CLAUSE" is constitutional.

III.

POSITION OF APPELLEE ROWLEY

Appellee Rowley concurs and reiterates the argument of the Appellee Department, as set forth in pages 9, 11, 12, 14 and 15 of its brief. However, Appellee Rowley, on behalf of himself, the Lumber & Sawmill Workers Union to which he belongs, and on behalf of those similarly situated, respectfully contends that this Court should decide the matter herein presented on a straight Constitutional basis and not upon the imposition of any technical rule to which the appellant may or may not be vulnerable. There are approximately thirty other cases of identical import now awaiting the final determination of the issues raised herein in the various Superior Courts of the State of Washington. If perchance this case should be decided upon technical grounds the Constitutional question would again have to be presented to this court at an additional expense and loss of time. This matter is, especially at this time, a matter of great interest to the public as well as to the employer and employee. Economic conditions may cause an increase in aggravation claims and therefore the Constitutionality should be promptly settled. It is therefore, the position of Appellee Rowley, with all due deference to the argument presented

by the Attorney General of the State of Washington to the effect that this case is not properly before this Court, that this Court decide whether or not the 5th and 14th Amendments to the Consittution has been violated by the enactment of the "AGGRAVATION CLAUSE" by the Legislature of the State of Washington in the proper exercise of its sovereign and police powers.

IV.

SUMMARY OF ARGUMENT

1. The 1941 "AGGRAVATION CLAUSE" is constitutional and does not constitute the taking appellant's property without due process of law.

2. The Washington Workmen's Compensation Act and the "Aggravation Clause" is strictly remedial in character and the shortening or lengthening of the statute in question only affects the remedy and not the right.

3. This precise question has heretofore been previously decided by the Supreme Court of the State of Washington and by this Court in *Mattsen v. Department of Labor and Industries, Campbell v. Holt* and *Chase Securities Corporation v. Donaldson.*

4. The Workmen's Compensation Act and the Aggravation Clause is a proper exercise of the police and sovereign powers of the State Constitution, and is not unreasonable, arbitrary or oppressive, so that the appellant has no vested right destroyed thereby.

V.

ARGUMENT

1. THE 1941 "AGGRAVATION CLAUSE" IS CONSTITUTIONAL AND DOES NOT CONSTITUTE THE TAKING OF APPELLANT'S PROPERTY WITHOUT DUE PROCESS OF LAW.

The Washington Workmen's Compensation Act abolished the common law actions for negligence for injuries received in extra-hazardous work and substituted therefor a purely statutory right by which the injured would be paid in accordance with the risk involved. Contributions to the fund are compulsory upon the employer. There is no contract in existence of any kind by reason thereof between the Employers and Employees which could be impaired. Consequently there is no contractual or vested right relationship existing either between the Employee and the State, or between the Employer and the State, or between the Employer and Employee. The fund is a creature of statute. It is a trust fund administered by the State for the benefit of injured workmen.

This question was considered by the Supreme Court of the State of Washington in *Mattsen v. Department of Labor and Industries,* 176 Wash. 345; 29 P. (2d) 675, in which it was stated, commencing on page 347, as follows:

> "The appellant contends that the law as it existed at the time of the injury is a part of the contract, and therefore that the amendment of 1927

impairs appellant's contractual rights in violation of Sec. 10, Article 1 of the Federal constitution, and that it also impairs the vested right of appellant to recover full compensation authorized by the statute in force at the time of the injury, thus violating the due process and the equal protection clauses of the fourteenth amendment to the Federal constitution and similar provisions of our state constitution.

"If this were an open question, it would be interesting to review the authorities and reason out an answer, but as it clearly appears that the questions here presented have already been directly decided by this court, the question is no longer an open one.

"The question here presented was necessarily presented and decided in each of the following cases: *Robinson v. McHugh,* 158 Wash. 157, 291 Pac. 330, and 160 Wash. 703, 295 Pac. 921; *Denning v. Quist,* 160 Wash. 681, 296, Pac. 145, and 172 Wash. 83, 19 P. (2d) 656; *Schmeiling v. Department of Labor and Industries,* 167 Wash. 692, 10 P. (2d) 229, and *Ferguson v. Department of Labor and Industries,* 168 Wash. 677, 13 P. (2d) 39.

"In each of the first two cases cited will be found a considerable discussion leading to the holding that the workman's rights under the law existing at the time of the injury are purely statutory rights, and may be taken away at any time by the legislature, and therefore the limitation contained in the act of 1927, which is here complained of, is purely remedial and destroys no vested right."

Subsequently the United States Supreme Court, in a review of the same case (293 U. S. 151) affirmed the same and which we will later discuss herein.

This Court has upheld the doctrine of *Campbell v. Holt,* 115 U. S. 620, and *Chase Securities Corporation*

v. Donaldson, ... U. S. ....., 89 L. Ed. (No. 15) 1109, 1113, 65 S. Ct. 1137, decided May 21, 1945.

2. THE WASHINGTON WORKMEN'S COMPENSATION ACT AND THE "AGGRAVATION CLAUSE" IS STRICTLY REMEDIAL IN CHARACTER, AND THE SHORTENING OR LENGTHENING OF THE STATUTE IN QUESTION ONLY AFFECTS THE REMEDY AND NOT THE RIGHT.

The Washington Act is unique in that there is no contract between the Employer and the Employee. The claimants are entitled to compensation by virtue of the provisions of the Act and for no other reason. And the peculiar part of the Washington Act is that a claimant must first establish his right to receive compensation by filing his claim within a year from the time of his injury. Once having established his right to compensation he has a continuing right thereto and thereafter. First he is entitled to time loss and then to permanent partial disability. If he suffers an *aggravation* of this injury he may apply to the Department of Labor and Industries in the time provided by the Statute, even though his claim has been closed. In the particular *aggravation clause* the time limit is five years from December 3, 1942.

It should be kept in mind that the "AGGRAVATION CLAUSE" as set forth in subdivision (h) applies to *readjustment of compensation, diminution or*

combination of disability after the rate of compensation shall have been established or terminated.

We believe that much of the difficulty presented herein is the failure to distinguish between a *right* and a *remedy*. Numerous Courts have differed over the application, logic and reasoning thereof.

Under the *"aggravation clause"* the claimants in Washington have the *right*, after their claim is closed, to apply for reopening of their claim, upon proof of aggravation once their claim has been established or terminated. This is the *right* of the Workmen conferred by the Act. It is a *right* they have to have their claim *readjusted* upon proof of aggravation. The claimants' *remedy* is the means by which their *right for readjustment (aggravation) may be enforced.*

Bouvier in his Law Dictionary, Volume II, Fourteenth Edition Revised, defines a *"right"* on page 484 as follows:

> "A well founded claim * * * the idea of a well founded claim becomes in law a claim founded in or established by the law: so that we may say a right in law *is an acknowledged claim.*" (Italics ours.)

Bouvier likewise defines a remedy in the same work on page 436 as follows:

> *"The means employed to enforce a right or redress an injury.* * * * Remedies are specific and cumulative; the former are those which can alone be applied to restore a right or punish a crime: for example where a statute makes unlawful what

was lawful before, and gives a particular remedy, that is specific, and must be pursued, and no other." (Italics ours.)

This court has distinguished between *rights* and *remedies* in *Chelentis v. Luckenbach Steamship Co., Inc.*, 247 U. S. 372, 384, to-wit:

> "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. * * * "

Consequently the workmen, or claimants, have the *right* to have their claims adjusted upon proof of the injuries which they sustain. The *remedy* is the method by which they may enforce their *right*.

Under the Washington Act claimants have three *remedies* to enforce their *rights*:

1. To apply within five years after the claim has been established or terminated for compensation.

2. To apply within five years after the effective date of the new act (effective December 3, 1942), upon compensation having been established or terminated prior to the effective date.

3. The Director of the Department of Labor and Industries may *at any time* upon his own motion, or upon application being made to him by the applicant, have his claim readjusted for aggravation.

4. There is still another class not heretofore touched upon for an allowance of compensation to a widow, chil-

dren or the beneficiaries upon a workman's death due to injuries. These were set forth in *Beels v. The Department of Labor and Industries,* 178 Wash. 301, 34 P. (2d) 917, in which the Washington Court held that under Rem. Rev. Statutes, § 7679 and § 7686, that while the law provides that a claim must be filed within one year from date of the injury that where the workman dies, his widow has an additional one year in which to file her claim.

The Washington Court has definitely decided that the "Aggravation Clause" is remedial, and that the bar of the Statute may be lifted without affecting vested rights, and that the statute of limitations applies both to common law and statutory causes of action. This is well set forth in *Herr v. Schwager,* 145 Wash. 101, 258 Pac. 1039, as follows:

> "The principal question is whether that act of the legislature operated to defeat a vested right of the appellants. In other words, the statute of limitations having once run, did the right of the appellants not to pay the obligation become vested.
>
> "Section 3 of art. 1 of the constitution of this state provides:
>
> " 'No person shall be deprived of life, liberty or property without due process of law.'
>
> "The Fourteenth Amendment to the constitution of the United States in part provides:
>
> " 'Nor shall any state deprive any person of life, liberty or property without due process of law.'
>
> "It will be noticed that the language of the two constitutional provisions is the same. In *Campbell*

v. Holt, 115 U. S. 620, the identical question here presented was before that court and it was held that the removal of the bar of the statute of limitations, after the statute had once run, did not conflict with the Fourteenth Amendment to the Federal constitution. It was there said, after reviewing the authorities:

"'In all this class of cases the ground taken is, that there exists a contract, but, by reason of no remedy having been provided for its enforcement, or the remedy ordinarily applicable to that class having, for reasons of public policy been forbidden or withheld, the legislature, by providing a remedy where none exists, or removing the statutory obstruction to the use of the remedy, enables the party to enforce the contract, otherwise objectionable.

"'Such is the precise case before us. The implied obligation of defendant's intestate to pay his child for the use of her property remains. It was a valid contract, implied by law before the statute began to run in 1866. Its nature and character were not changed by the lapse of two years, though the statute made that a valid defense to a suit on it. But this defense, a purely arbitrary creation of the law, fell with the repeal of the law on which it depended.

"'It is much insisted that this right to defense is a vested right, and a right of property which is protected by the provisions of the Fourteenth Amendment.

"'It is to be observed that the word vested right is nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it.

"'We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they

are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution.

"'We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power.. *Tioga Railroad v. Blossburg and Corning Railroad*, 20 Wash. 137, 150. And other statutes, shortening the period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete. The right does not enter into or become a part of the contract. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legisature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost.'

"To that opinion, two of the members of the court dissented. The dissenting opinion recognizes that the running of the statute does not destroy the obligation but that, when the statute has once run, there is a vested right not to pay the obligation, even though it still exists. The question has been before the courts of last resort of a considerable number of the states and there is among them a division of authority, some taking the view of the majority opinion in *Campbell v. Holt, supra*, and others adopting the opposite view. Numerically the greater number are of the latter class. It would serve no useful purpose here to assemble and discuss these various cases. They may be readily found cited in any standard text on the subject and in the notes to cases that are annotated. The

> provision in the Federal constitution and that of this state being the same, while the holding in *Campbell v. Holt, supra,* is not necessarily controlling, it should, as stated in *State v. Buchanan,* 29 Wash. 602, 70 Pac. 52, 92 Am. St. 930, 59 L. R. A. 342, be given 'great weight.' It seems to us, after reading all the cases which have decided the question, that the better reasoning is with the majority view of the federal supreme court. If, as all courts hold, a statute of limitation operates upon the remedy only and does not destroy the obligation, we think that, by the running of the statute, a debtor does not acquire a vested right not to pay a debt which at no time has been destroyed."

To the same effect is *Campbell v. Holt,* which will be discussed later.

It should be observed that a workman need not comply with the statute of limitations as a condition precedent to his right of compensation, *because the statute merely affects his remedy.* Therefore, the general statute of limitations is entirely different from the one that we are considering, which after all is an ordinary statute of limitations *operating upon a right created by the statute. It is not a condition precedent to the right.* Appellant has confused the issue, as it is discussing a statute of limitations which is a *condition precedent to the right* (as contrasted to a condition subsequent) and in which there *rests only one remedy inherent in that right.*

The Washington State Supreme Court carefully considered the distinction between a *right and remedy* in *Lane v. Department of Labor and Industries,* 21

Wash. (2d) 420, 151 P. (2d) 440, 77 A.L.R. 1347, Am. Jur. 44, commencing on page 424 as follows:

"The employers assert that after a claim of the kind before us is once barred, it cannot be revived by subsequent legislation because a right of immunity in favor of the employer arises which constitutes a vested right and its impairment is protected by constitutional inhibitions. The claimants and the attorney general contend that the act relates only to the remedy of the workman and does not affect any vested right of the employer. Many authorities are cited by the respective counsel. There is a conflict of authority on the general subject, but much of it disappears when the nature and scope of the different statutes are considered.

"There are two types of statutes which the courts had to apply. One of them is the statute which either by its plain terms or by the construction given it by the court makes the limitation of time inhere in the right or obligation rather than the remedy. It is sometimes referred to as a statute of non-claim, and, strictly speaking, is not a statute of limitations at all. In its usual form the statute creates some right or obligation and a time is fixed within which the right must be asserted or the obligation sought to be enforced, or the same will be barred. When the limitation period expires the right or obligation is extinguished and cannot be revived by a subsequent statute enlarging the time limitation. Illustrations of nonclaim statutes in this state are those providing for liens of laborers and materialmen, claims against estates of deceased persons, and claims for damages against municipal corporations.

"The courts seem to be in substantial accord that a statute of limitations cannot enlarge the time for the commencement of an action when the time limitation therefor is fixed by contract; also in cases where one has been in possession of property for the period required to bar an action by the

real owner for its recovery, the theory being that, by the lapse of the statutory time, title to the property has passed and it cannot be divested by a statutory revival of the right of action to recover its possession. This court has held that the right to enforce a lien for street improvements cannot be enlarged by statute after the time limit therefor has expired. *Seattle v. DeWolfe,* 17 Wash. 349, 49 Pac. 553. In *Earle v. Froedtert Grain & Malting Co.,* 179 Wash. 341, 85 P. (2d) 264, and *Peeples v. Hayes,* 4 Wn. (2d) 253, 104 P. (2d) 305, it was decided, with reference to a statute relating to actions to recover on the ground of unlawful preferences, that it is not in its strict sense one of limitation at all, but one that goes to the right to recover, and not merely to the remedy. This is the theory of the leading case of *William Danzer & Co. v. Gulf & I. R. Co.,* 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126, relied on by counsel for the employers.

"The other type of statute is one which relates only to the remedy and has nothing to do with any right or obligation, does not inhere in either, and is wholly independent of them. It is a statute of limitations in its strict sense, and, although a remedy may become barred thereunder, the right or obligation is not extinguished. It is a statute of repose.

"There is no constitutional inhibition against the revival of a barred remedy. The leading case on the subject is *Campbell v. Holt,* 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483. We have adopted and followed the rule of that case in *Herr v. Schwager,* 145 Wash. 101, 258 Pac. 1039. The distinctions between the different types of statutes as bearing upon the question of whether a claim against which a limitation has run can be revived by a subsequent limitation statute, will be found in the annotations and the cases to which they are appended in 36 A. L. R. 1316, 46 A. L. R. 1101, 67 A. L. R. 297, 78 A. L. R. 1294, 133 A. L. R. 384.

"There are cases contrary to *Campbell x. Holt* and *Herr v. Schwager* which hold that, if the remedy is barred, the immunity from suit is a right that cannot be impaired by a statute o revival but we definitely declined in the *Herr* case to follow them and we have not departed from the doctrine of that case. * * * The act took away from the workman his common-law right of action for negligence. In its place it provided for industrial insurance. The employer is taxed to create and maintain an accident fund. The state administers the fund through one of its agencies. The act creating the right of the workman to compensation fixed a time limit within which he must make his claim after the day upon which the injury occurred or the right thereto accrued and provided that if he did not do so such claim would not be enforcible; but it did not fix any time limit within which an injured workman whose rate of compensation had been established or his compensation had been terminated might apply for an adjustment in the event of aggravation of his injury thereafter. A rovision was made that the department might, 'upon its own motion readjust for further application the rate of compensation . . .' The law remained this way until 1927, when it was provided that a workman claiming aggravation must make claim therefor within a three-year period.

"The employer has never had anything to say about when a claim for aggravation of injury may be made, and the fact that after sixteen years of operation of the law the legislature decided to require the injured workman claiming aggravation to make his claim within a limited time, did not change the status of the employer with reference to the accident fund. It did not thereby create a statute of nonclaim. It merely affected the remedy of the injured workman. It was enacted for the benefit of the department so that it would not have to consider stale claims, when perhaps the securing of evidence as to their merit might be difficult

or impossible. The claim of the workman is not one against the employer and the limitation period was not made for the employer's benefit.

"The limitation periods fixed by the acts of 1927, 1929 and 1941 have no relation to the right to a readjustment of compensation created by the act of 1911, and do not inhere therein, but relate only to the remedy of the claimant. The lapse of time limitation does not build up any immunity in favor of the employer or bring into being any vested right that can be affected if the time limitation is changed. We held in *Matson v. Department of Labor and Industries,* 176 Wash. 345, 29 P. (2d) 675, that no vested right of an injured workman was affected when a limitation period was provided where none had existed before, and the same authority exists to enlarge the time for making claims for readjustment, and, for the same reasons given in that case, no vested right of an employer would be affected.

"The act of 1941 before us is so plain and all inclusive in its wording as not to need construction. It applies to all applicants for readjustment whose compensation has been established or terminated, and in passing it the legislative authority has encountered no constitutional inhibitions."

The Washington Court has further held in *Smith v. Department of Labor and Industries,* 8 Wn. (2d) 587, 113 P. (2d), 57, that the 1927 "Aggravation Clause" does not limit the time in which the Director of the Department and Labor and Industries may in his own discretion reopen the claim upon his own motion, and that the limitation as to time applies only to the application of the beneficiary. Thus it will be seen that a claimant's right to compensation is *never dead and never dies.* The

decision of the Director is absolutely and not reviewable by any court.

That the Legislature of the State of Washington has the power to enlarge or decrease the claimant's existing statutory rights is well set forth in *Denning v. Quist*, 160 Wash. 681, 296 Pac. 145, at page 686, as follows:

> "This act, according to the declaration of legislative policy therein contained, and its manifest purpose, should be classed *as remedial legislation.* Section 1, *supra,* is comprehensive in its terms, and does away with rights of action previously existing in favor of injured workmen, including *rights* theretofore existing at common law. *Rights of action* vested by the act in favor of injured workmen (*Robinson v. McHugh, supra*) became thereafter purely *statutory rights,* not common law rights. The 1927 amendment (chap. 310, Laws of 1927 p. 813), as stated in the case of *Robinson v. McHugh, supra, somewhat enlarged the remedy existing under the original act of* 1911 *in favor of the workmen* injured by the negligence or wrong of one not in the same employ. *This amendment, however, did not re-establish in favor of the injured workman any common law right, but simply enlarged his existing statutory right. This right being purely statutory, it was competent for the legislature to limit the same, as was accomplished by the* 1929 *amendment ,supra, and we are satisfied that the correct rule was laid down by this court in the case of Robinson v. McHugh, supra.*" (Italics ours.)

That court adhered to its previous holding in the second case on appeal of *Denning v. Quist*, 172 Wash. 83, 19 P. (2d) 656, in which it further stated on page 86 thereof, as follows:

"In *Robinson v. McHugh,* 158 Wash. 157, 291 Pac. 330, we, in effect, held that the excepted rights of action upon which a workman might sue in the courts for injuries suffered by him while engaged in extra-hazardous employment became, in legal effect, statutory rights of action, and not common law rights of action. That decision was adhered to by the court sitting *En Banc* upon a rehearing of that case. 160 Wash. 703, 295 Pac. 921. Our *En Banc* decision in *Denning v. Quist,* 160 Wash. 681, 296 Pac. 145, was also to the same effect. *Therefore, it is settled law that whatever right of action in the courts appellant may now have, or heretofore had, since the original enactment of chapter* 74, *Laws of* 1911, *p.* 345, *Rem. Rev. Stat., Sec.* 7673, *is a statutory right, and not a common law right.* Whether or not he now has, under chapter 90, Laws of 1931, p. 263, Rem. Rev. Stat., Sec. 7697, a restored statutory right of action taken from him by chapter 132, Laws of 1929, p. 325, Rem. Rev. Stat., Sec. 7675, is the question to decide." (Italics ours.)

It will be noted that that court stated that under the circumstances of the *Denning v. Quist* case, 160 Wash. 681, 296 Pac. 145, that the *statutory rights of action taken from him could be restored,* and that court said on page 90 thereof, as follows:

"It is contended in his behalf that the above italicized language of chapter 90, *supra, restored to him his right of action in the courts existing up to the time that chapter* 132, *Laws of* 1929, *p.* 325, *became effective, which, as we held in Denning v. Quist, supra, had deprived him of all right of action i nthe courts to recover for his injury against a third party situated as were respondents in their relation to his extra-hazardous employment.* The language of the 1931 amendment relied upon is:

" 'This act shall not affect any cause of action existing at the time said chapter 132 of the Session Laws of 1929 became effective, or the right ot take an appeal and/or bring an action thereon, or any appeal pending, or right of appeal existing at the time said chapter 132 of the Session Laws of 1929 became effective.' Rem. Rev. Stat., Sec. 7697.

"Although the language above quoted is somewhat vague and uncertain, all parts of an act may be considered to ascertain the legislative purpose, and it is manifest by the title to the act that it was the purpose of the legislature to 'reserve to all parties having causes of action existing at the time chapter 132, *supra,* took effect, 'to bring and prosecute proceedings or action thereon,' *to restore or reserve to some person or persons having some kind of a right of action, such right. It would seem that the rights intended to be restored, or reserved, or not affected, were such as that of appellant here. It is a rule of statutory construction almost universal that it is the duty of the courts to give such construction to the language of a statute as will make it purposeful and effective, rather than futile and meaningless.*

"Unless, as above indicated, it was the sole purpose of the legislature in enacting chapter 90, *supra,* to permit persons having causes of action against third parties to recover damages from them on account of their negligence, although that was a statutory action, or rather a statutory election, the legislation was meaningless and ineffective." (Italics ours.)

In this respect, the court should consider the majority and minority holdings in the case of *Reeder v. Crewes,* 199 Wash. 40, 90 P. (2d) 267.

Thus it will be seen that the ordinary statute of limitations, be it at common law or by statute, is *reme-*

dial in character, and that the bar of the statute may at any time be enlarged or decreased, or lifted at any time without effecting any vested rights.

That the Workmen's Compensation Act of Washington is remedial should be so firmly established that citation thereof is unnecessary. The rule is well set forth in *Nelson v. Department of Labor and Industries*, 9 Wash. (2d) 621, 115 P. (2d) 1014, at page 628, when that Court said:

> "As a prefatory remark, it seems advisable to recall to mind that workmen's compensation acts are considered *remedial in character, the provisions of which should be construed broadly and liberally in order to effectuate their purpose, which, among other things, is to benefit the working man. Hilding v. Department of Labor and Industries*, 162 Wash. 168, 298 Pac. 321; *State ex rel. Crabb v. Olinger*, 196 Wash. 308, 82 P. (2d) 865; *Campbell v. Department of Labor and Industries*, 2 Wn. (2d) 173, 97 P. (2d) 642." (Italics ours.)

To the same effect is *Hilding v. Department of Labor and Industries*, 162 Wash. 168, 175:

> "This court is committed to the doctrine that our workmen's compensation act should be liberally construed in favor of its beneficiaries. It is a humane law and founded on sound public policy, and is the result of thoughtful, painstaking and humane considerations, and its beneficent provisions should not be limited or curtailed by a narrow construction."

Likewise the Act was held remedial in *Mattson v. Department of Labor and Industries*, 176 Wash. 345,

29 P. (2d) 675; 293 U.S. 151, which will be discussed more fully herein.

3. THE PRECISE QUESTION HAS HERETOFORE BEEN PREVIOUSLY DECIDED BY THE SUPREME COURT OF THE UNITED STATES IN THE *MATTSON V. DEPARTMENT* CASE, *CAMPBELL V. HOLD* AND *CHASE SECURITIES CORPORATION V. DONALDSON*. THESE THREE CASES ARE DETERMINATIVE OF ALL THE QUESTIONS HEREIN PRESENTED, AND THE CAREFUL ANALYSIS OF EACH CASE SHOULD BE MADE.

(A.) *The Mattson case.* As heretofore stated the Mattson case is determinative of the question that the Washington Workmen's Compensation Act is *remedial*, and that the Legislature may enlarge or decrease the Statute of Limitation and that it is a proper exercise of the police powers of the State. The claimant in that case was injured in February of 1927, which was before the 1927 limitation was first placed upon a workman in which to file an aggravation claim. His claim was allowed and closed in January of 1928. In May of 1933 (after the 3-year period had expired), the claimant made application to reopen his claim for aggravation of previous injuries, and his application was denied on the ground that the three-year statute of limitations had run and all his right were barred. The Washington Supreme Court affirmed the judgment of the lower Court, upholding the decision of the Depart-

ment of Labor and Industries for the reason the workman's right under the law existing at the time of the injury were purely statutory and could be taken away at any time, and that the limitation being purely remedial destroyed no vested right. This case was appealed to this Court, which affirmed the same.

It should be noted that in the Mattson case it was the *workman* or *claimant* who alleged that he had a vested right to apply for aggravation, and that it was property, and that its enforcement could not be abolished or limited without violating the due process of the clause of the 14th Amendment of the Federal Constitution. This Court held, stating at page 154:

> "The Washington Workmen's Compensation Act is compulsory. In the exercise of the State's police power it abolishes common law actions for negligence, imposes upon industry a levy calculated in accordance with the risk of injury to workmen, places the money collected in a state-administered fund, and substitutes for the employee's common law right of action a purely statutory right to payment from the fund of a sum adjusted to the character and extent of the injury.
>
> "That the State may impose reasonable conditions upon the assertion of the claim does not admit of argument. Considerations justifying a reasonable limitation of time within which further increase of compensation due to aggravation of condition may be claimed are so obvious as hardly to require statement. Appellant does not urge to require statement. Appellant does not urge that the prescription of a period of three years for presenting such a claim is unreasonable, but that it is

beyond the State's power. The section under attack merely limits the time for the assertion of the right, effects the remedy only, and that in a manner not unreasonable, arbitrary or oppressive. Such a limitation of time within which appellant's remedy must be pursued does not deprive him of due process."

If it is Constitutional for the *workman* to have the time in which to file his claim for aggravation cut from an *unlimited time* (as provided by the Act from 1911 to 1927) to three years (as provided by the 1927 Amendment) then it is just as Constitutional to *grant him an additional five years* from December 3rd, 1942, in which to file his claim for aggravation upon his claim being heretofore established and terminated. If the *workman* did not have a vested right taken away from him as he contended in the Mattson case, then *neither has the employer a vested right in the present controversy of which he is being unlawfully and unconstitutionally deprived.* The Workmen's Compensation Act must be considered in its entirely and if in any part it is unconstitutional, it is all unconstitutional, as it must be considered as a whole and not part by part.

(B.) *Campbell v. Holt.* This was an action on contract for payment of money. The statute of limitations ran against the claim and thereafter a new constitution was adopted by Texas extending the statute of limitations. This Court held that no right to real or personal property were involved and that therefore the State

Legislature could repeal or extend the statute of limitaton after the rght of acton was barred, as the statute of limitations *only barred the remedy and did not destroy the right,* and consequently it is not in contravention of the Fourteenth Amendment.

The Washington Supreme Court in *Herr v. Schwager,* 145 Wash. 101, 258 Pac. 1039, held that the doctrine adopted by Campbell v. Holt, by stating in *Lane v. Department of Labor and Industries, supra,* on page 426 of the opinion:

> "There are cases contrary to Campbell v. Holt and Herr v. Schwager, which hold that, if the remedy s barred, the immunity of the suit is a right that cannot be impaired by a statute of revival, *but we definitely declined in the Herr case to follow them, and we have not departed from the doctrine of that case."* (Italics ours.)

The appellant contended in the two respective appeals of the instant case before the Washington Supreme Court that Campbell v. Holt had no application to the issues herein presented because the statute of limitations in the Campbell-Holt case involved the common law right as distinguished from the statutory right, and further that the Campbell-Holt case was the minority doctrine and was impliedly overruled or distinguished in *William Danzer & Co. v. Gulf & S.I.R. Co.,* 268 U.S. 633, 45 S. Ct. 612, 60 L. Ed. 1126.

Much relance was placed on these facts by the appellant. However. since the instant case was appealed

this court did decide and determine the matter in *Chase Securities Corporation v. Donaldson, Supra.*

(C.) *Chase Securities Corporation v. Donaldson.* The State of Minnesota extended the statute of limitations as a defense under an action instituted under the Blue Sky Law. It was contended that this constituted a violation of the Fourteenth Amendment, and that Campbell v. Holt had been superseded. However, this Court adhered to the doctrine of Campbell v. Holt, and held that the lifting of the bar of the statute of limitations so as to restore a remedy lost through mere lapse of time is *per se* not in violation of the Fourteenth Amendment.

Appellant apparently erroneously bases its entire contention on the fallacious premise that the Workmen's Compensation Act created a new right in the workman and imposed a new liability upon the employer, and that when the right thus created by statute also specifies the time in which the right must be asserted, the faiure to assert the right within the time destroys the right, and that once the right is destroyed it cannot be thereafter revived. We believe that this is effectively answered by the language of the Washington Supreme Court in *Lane v. Department of Labor and Industries, supra,* on page 426, in which it said:

> "The other type of statute is one which relates inly to the remedy and has nothing to do with the right or obligation, and does not inhere in either,

> and is wholly independent of them. It is a statute of limitations in a strict sense, and, although a remedy may become barred thereunder, the right or obligation is not extinguished. It is a statute of repose. There is no Constitutional inhibition against the revival of a barred remedy."

and on page 428,

> "* * * It merely affected the remedy of the injured workman."

and further on page 429,

> "The limitation periods fixed by the acts of 1927, 1929 and 1941 have no relation to the right to a readjustment of compensation created by the act of 1911, and do not inhere therein, but relate only to the remedy of the claimant. The lapse of time limitation does not build up any immunity in favor of the employer or bring into being any vested right that can be affected if the time limitation is changed."

The compliance with the statute is not a condition precedent to the right created by the statute. The statute only operates upon the right. The claimant has the right to have his claim adjusted for aggravation upon proof, and he has three remedies, which we have set forth heretofore, by which the right may be enforced. All the cases cited by the appellant are thus distinguished as they are entirely based upon the proposition that the statute of limitations is a condition precedent to the right as contrasted to a condition subsequent, and in which there is only one remedy inherent in that right.

4. THE WORKMEN'S COMPENSATION ACT AND "AGGRAVATION CLAUSE" IS A PROPER EXERCISE OF THE POLICE AND SOVEREIGN POWERS OF THE STATE AND FEDERAL CONSTITUTIONS AND AMENDMENTS THERETO AND IS NOT UNREASONABLE, ARBITRARY OR OPPRESSIVE, AND APPELLANT HAS NO VESTED INTEREST THEREIN.

The Washington Workmen's Compensation Act first enacted by the 1911 Legislature, provided in Section 1, its declaration of police power, and did provide as follows:

> *"The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair.* Its administraton has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. *The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided* regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this

act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the State over such causes are hereby abolished, except as in this act provided. (Italics ours.)

and it was specifically stated therein that the State of Washington was exercising its police and sovereign powers. The Washington Supreme Court has held in an unbroken line of decisions that the enactment of the Washington Compensation Act is a proper exercise of the police and sovereign powers, and a few of the cases in conformity therewith are as follows:

State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101;

Fisher Flouring Mills Co. v. Brown, 109 Wash. 690, 187 Pac. 399;

State ex rel. Lane v. Fleming, 129 Wash. 646, 225 Pac. 647;

Seattle v. Gervasi, 144 Wash. 429, 259 Pac. 328;

Shea v. Olson, 185 Wash. 143, 53 Pac. (2d) 615;

Mountain Timber Co. v. Washington, 243 U. S. 237.

In the latter case this Court stated:

> In the present case the Supreme Court of Washington (75 Washington, 581, 583), sustained the law as a legitimate exercise of the police power, referring at the same time to its previous decision in the *Clausen Case,* 65 Washington, 156, 203, 207, which was rested principally upon that power, but also ((pp. 203, 207), sustained the charges, imposed upon employers engaged in the specified industries as possessing the character of a license tax for revenue and a tax for purposes of regulation. * * * "

Again, at page 241 of the same case, we find this language:

> "As to the first point: The authority of the States to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people, carries with it a wide range of judgment and discretion as to what matters are orf sufficiently general importance to be subjected to state regulation and administration. *Lawton v. Steele,* 152 U. S. 133, 136. 'The police power of a State is as broad and plenary as its taxing power.' *Kidd v. Pearson,* 128 U. S. 1, 26. In *Barbier v. Connolly,* 113 U. S. 27, 31, the court, by Mr. Justice Field, said: 'Neither the (fourteenth) amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. * * * '"

Likewise in *Whitaker v. Green River Coal Co.* 122, S.W. (2d) 1012, at pages 1014 and 1016, it was said:

> "The 'due process' clause of the constitution does not operate as a limitation upon the *reasonable* and proper exercise of the police power of the state. To determine whether or not regulation of the mining industry comes within the purview of the police power, we have only to exercise our common knowledge which tells us that this is a highly hazardous industry, involving the safety of thousands of miners and the preservation and use of highly valuable property continuously in danger of destruction or damage from the careless use of adjoining properties. * * *"

To the same effect is *Mattsen v. Department of Labor and Industries, Supra*. In the instant case the Washington Supreme Court held in *Lane v. Department of Labor and Industries, Supra,* page 427:

> "The workmen's compensation act and its amendments is an exercise of the police power of the state and in their enactment the legislature did not encounter many of the constitutional limitations it might have otherwise. *Raymond Lumber Co. v. Raymond Light &Water Co.,* 92 Wash. 330, 159 Pac. 133; *Shea v. Olson,* 185 Wash. 143, 53 P. (2d) 615. In the latter case we said, p. 153:
>
> "We next consider the provisions of Art. I, §§3 and 12 of the state constitution and the fourteenth amendment of the United States Constitution, relating to due process and the equal protection of the laws.
>
> "None of these constitutional provisions apply to laws enacted by a state legislature in the exercise of its police power. We have repeatedly so held." (Citing authorities.)

We once more refer to the declaration contained in the original Workmen's Compensation Act of 1911, which stated in part in Section 1:

> "The remedy of the workmen has been uncertain, slow and inadequate. Injuries in such work, formerly occasional, have become frequent and inevitable. The welfare of the State depends upon its industries, and ever more upon the welfare of its wage workers."

These words are as true today as when they were written in 1911, and we respectfully submit that this Court should immediateley give effect to subdivision

(h) of the "Aggravation Clause" as intended by the Legislature of 1941, adopted by the Electorate in 1942, and as construed by the Supreme Court of the State of Washington in 1944 and 1945.

The appellant has contended that it has a vested interest in the accident fund of the State of Washington and by reason of the additional compensation which has been ordered paid by the Supreme Court of the State of Washington, and payment thereof has been suspended by supersedeous bond by a direct appeal to this Court. The Employer contends that its payments are more than a license tax. Various cases are thereafter cited in support of this contention. However, whatever may have been the deviations by the Washington Courts, all of these cases have been superseded by *Lane v. Department of Labor and Industries, Supra,* which forever definitely decides the issue in these words on page 427:

> When the original act of 1911 came before the court, it was decided that the money an employer paid into the accident fund was a license tax on his privilege to carry on his business. *State ex rel. Davis-Smith Co. v. Clausen,* 65 Wash. 156, 117 Pac. 1101. This view was approved in *Mountain Timber Co. v. State of Washington,* 243 U. S. 219, 237, 61 L. Ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642, in which it is said:
>
> "In the present case the Supreme Court of Washington (75 Washington, 581, 583), sustained the law as legitimate exercise of the police power, referring at the same time to its previous decision

in the *Clausen Case,* 65 Washington, 156, 203, 207, which was rested principally upon that power, but also (pp. 203, 207), sustained the charges imposed upon employers engaged in the specified industries as possessing the character of a license tax upon the occupation, partaking of the dual nature of a tax for revenue and a tax for purposes of regulation."

We followed this viewpoint in *State v. Vinther,* 176 Wash. 391, 29 P. (2d) 693; and the same thought is the basis of *State ex rel. Crabb v. Olinger,* 196 Wash. 308, 82 P. (2d- 865.

The fact that an employer has a right to appear and contest a claim of an injured workman and to take an appeal from an adverse decision does not give him any right in or to the accident fund, and we have never held that he has any so-called vested right therein. The reason he may contest a claim is that his cost experience would be affected by an unlawful use of the fund. When it is finally decided that a claimant is entitled to compensation; all further interest on the part of the employer ceases, and all procedural and administrative questions are of no concern of his, but lie only between the claimant and the department.

The Washington Supreme Court has also subsequent to the *Lane Case, supra,* held to the same effect in *Monroe Logging Company v. Department of Labor and Industries,* 21 Wash. (2d) 800, 153 P. (2d) 511, saying:

"The position is without foundation. The premiums payable for industrial insurance are excise taxes. *State ex rel. Davis-Smith Co. v. Washington,* 243, U. S. 219, 61 L. Ed. 685, 37 S. Ct. 260; Lane v. Department of Labor and Industries, 121 Wash. Dec. 395, 151 P. (2d) 440. That an admin-

istrative officer has no power to waive the collection of taxes provided for by legislative enactment, is elementary."

The time limitation is not unreasonable, arbitrary or oppressive. This seems especially to be true in view of the fact that this Court has previously held in the *Mattsen Case* that the due process and equal protection clauses of the 14th Amendment were not infringed nor any vested right of the claimant impaired when the time limitation was changed from an unlimited time to three years within which to make application for reopening for aggravation. As stated before, if the workmen's rights are not impaired by shortening the period from an unlimited time to three years, then the employer's rights are not impaired by enlarging the time limitation. The employer has no vested right merely because the workmen's remedy has been extended and liberalized.

It should be emphasized that the appellant has no vested interest of any kind in the accident fund whatsoever. Any payments or increased premiums by reason of cost experience are paid into the fund. Circumstances in the industry may be such that the premiums would be decreased so that there would not be any increased payments by the employer in question. The matter and amount of payments is entirely between the State as custodian of the Trust Fund and the employees. Surely it cannot successfully be stated that the

employer has any vested rights therein and that his property is being unlawfully taken without due process of law. No right is created out of old circumstances to appellant's damage. The remedy of adjustment is merely enlarged.

CONCLUSION

By virtue of the foregoing reasons, the judgment of the Washington State Supreme Court should be affirmed upon the ground that the employer has no vested right by decreasing or enlarging of the time limitation in which aggravation claims can be filed, and that the Washington Act is not in violation of the Fifth and Fourteenth Amendments to the Federal Constitution.

Respectfully submitted,

JAY C. ALLEN,
CHARLES R. CAREY,
Attorneys for Appellee, Ralph Rowley.

APPENDIX

Chapter 74, Laws of 1911 (the Original Washington Workmen's Compensation Act):

The title "Relating to Compensation of Injured Workmen," and the heading therof reading as follows:

"An Act relating to the compensation of injured workmen in our industries, and the compensation of their dependents where such injuries result in death, creating an industrial insurance department, making an appropriation for its administration, providing for the creation and disbursement of funds for the compensation and care of workmen injured in hazardous employment, providing penalties for the nonobservance of regulations for the prevention of such injuries and for violation of its provisions, *asserting and exercising the police power in such cases,* and, except in certain specified cases, abolishing the doctrine of negligence as a ground for recovery of damages against employers, and depriving the courts of jurisdiction of such controversies, and repealing sections 6594, 6595 and 6596 of Remington's and Ballinger's Annotated Codes and Statutes of Washington relating to employes in factories, mills, or workshops where machinery is used, actions for the recovery of damages and prescribing a punishment for the violation thereof.

"Be it enacted by the Legislature of the State of Washington:

"Section 1. Declaration of Police Power.

"The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the

cost of the employer has reached the workman and that little only at large expense to the public. *The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided* regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided i nthis act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the State over such causes are hereby abolished, except as in this act provided." (Italics ours.)

Section 5, paragraph (h) thereof:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments."

Subdivision (h), section 4, Chapter 310, Session Laws, 1927:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been estab-

lished or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided,* Any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment."

Subdivision (h) section 1, Chapter 209, Laws of Washington, 1941:

(h) If aggravation, diminution or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the Director of Labor and Industries, through and by means of the Division of Industrial Insurance, may, upon the application of the beneficiary, made within *five* years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment. *Provided, Any such applicant whose compensation has heretofore been established or terminated shall have five* (5) *years from the taking effect of this act within which to apply for such readjustment."* (Italics ours.)

SUPREME COURT OF THE UNITED STATES.

No. 53.—October Term, 1945.

Gange Lumber Company, Appellant, *vs*, Ralph Rowley and Department of Labor and Industries of the State of Washington.	Appeal from the Supreme Court of the State of Washington.

[November 13, 1945.]

Mr. Justice Rutledge delivered the opinion of the Court.

This appeal is from a judgment of the Supreme Court of Washington rendered after the case journeyed twice through the state's appropriate administrative and judicial tribunals. 21 Wash. 2d 420; 122 Wash. Dec. (No. 8) 234.[1] The judgment sustained an award made by the appellee, Department of Labor and Industries, in favor of Rowley, the individual appellee. The award was for compensation on account of the aggravation, by 1943, of injuries originally sustained by Rowley in 1937 in the course of his employment by appellant. A prior award for the original injury, made in 1938, became "final"[2] without appeal and is only indirectly in issue. Both awards were made pursuant to the state's statutory provisions for industrial insurance and were payable from a publicly administered fund maintained, as the statute required, by "premiums" or contributions of employers.[3] Ap-

[1] The procedure for making claims before the Department of Labor and Industries and for obtaining judicial review is sketched below in note 10. On the first journey of the cause to the Supreme Court, the Department and the Superior Court held that the claim was out of time and that it should be dismissed. After reversal of these rulings, the case was returned to the Department for the making of an award and its order accomplishing this was affirmed by the Superior and Supreme Courts, as against appellant's constitutional objections urged here and others.

[2] The award became final, for purposes of review, in so far as the amount of compensation allowable for the original injury as proved in that proceeding was concerned. But it was at all times subject to being reopened for the allowance of additional compensation on account of aggravation of the original injury taking place after the original award. See note 5; also notes 14, 15 and text.

[3] Washington's original Workmen's Compensation (or more properly Industrial Insurance) Act was adopted in 1911, Laws of Wash., 1911, c. 74 (Remington's Revised Statutes of Washington, §§ 7673 *et seq.*). For

pellant claims that the statute has been applied, in respect to its liability for the payment of premiums, in a manner to deprive it of property without due process of law, contrary to the prohibition of the Fourteenth Amendment.

The controversy results from a 1941 amendment of the Washington Industrial Insurance Act,[4] by which the time allowed for the beneficiary of an award to apply for additional compensation on account of aggravation of his injury was extended from three to five years after the establishment (or termination) of compensation or, by virtue of a proviso, to five years from the amendment's effective date.[5] Since Rowley's application presently involved was made in time only by virtue of the proviso,[6] appellant asserts that the amendment has been applied retroactively to revive a claim barred by the preexisting law, to its substantial det-

---

purposes material to the disposition of this cause, the Act was amended in 1927, by placing a limit of three years from specified dates upon the filing of claims by injured workmen for aggravation of injuries [Laws of Wash., 1927, c. 310, p. 844; Rem. Rev. Stat. Wash., 1932, § 7679(h), amending Laws of 1911, c. 74, § 5(h)], and in 1941 (effective December 3, 1942) by extending the three-year period to five years. Laws of Wash., 1941, c. 209, § 1; Rem. Rev. Stat. Wash., 1941 Perm. Supp., § 7679, amending subsection (h) of the 1927 amendment.

[4] See note 3.

[5] The provision, as amended in 1941, was as follows: "If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, *made within five years after the establishment or termination of such compensation, or upon his own motion*, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided, Any such applicant whose compensation has heretofore been established or terminated shall have five years from the taking effect of this act within which to apply for such readjustment.*" Laws of Wash., 1941, c. 209, § 1; Rem. Rev. Stat. Wash., 1941 Perm. Supp., § 7679(h). (Emphasis added.)

The 1927 amendment, see note 3, was identical except for use of the word "three" where "five" is employed. The original provision, in force from 1911 to 1927, was as follows: "If *aggravation, diminution, or termination* of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case *the department may, upon the application of the beneficiary or upon its own motion, readjust* for future application *the rate* of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments." Laws of Wash., 1911, c. 74, § 5(h). (Emphasis added.)

[6] The original injury was incurred July 13, 1937. The original award, of $307.50, for permanent partial disability of the right hand, became "final," cf. note 2, March 9, 1938. The 1927 amendment, see notes 3 and 5, was in force at that time and until December 3, 1942, when the 1941 amendment became effective. Rowley's claim for aggravation was not filed until March 19, 1943, more than five years from the time the original award was "closed," but less than five years from the date the 1941 amendment, with the proviso, became effective.

riment; and thereby, under this Court's decision in *Danzer & Co.* v. *Gulf & S. I. R. Co.*, 268 U. S. 633, the claimed unconstitutional consequences have been created.

Appellees have responded by relying upon *Campbell* v. *Holt*, 115 U. S. 620, and *Chase Securities Corp.* v. *Donaldson*, 325 U. S. —. They have urged that as applied the statute has produced no unconstitutional injury or detriment to any substantive interest of appellant; and that the only effect has been to modify its procedural rights, in particular by supplying judicial review of awards for aggravation where previously only an administrative remedy was available to the employee.[7] As all of these contentions are somewhat interrelated, precise consideration requires more explicit statement of the statutory scheme in its application to the facts.

Washington's plan of industrial insurance is much like that of Ohio, briefly described in *Copperweld Steel Co.* v. *Industrial Insurance Commission*, 324 U. S. 780; cf. *Mattson* v. *Department of Labor*, 293 U. S. 151. The state Supreme Court has characterized the system as neither an employers' liability act nor an ordinary workmen's compensation act, but rather as an industrial insurance statute having all the features of an insurance act. *Stertz* v. *Industrial Insurance Commission*, 91 Wash. 588, 594-595. Salient characteristics, for present purposes, include the maintenance and administration by the state of an accident fund, which is paid into the state treasury by employers pursuant to annual assessments made by the Director of Labor and Industries, through the Supervisor of Industrial Insurance. Except in situations not presently material,[8] injured employees are deprived of common-law causes of action against their employers and are restricted to recovery from this fund as reparation for injuries sustained at work.

The Director is empowered to promulgate, change and revise rates to be paid by employer contributors. The scheme for determining the rates is somewhat complicated, requiring classification of contributors and their work according to its hazard; and adjustment of premiums to take account of the cost experience not only of each class but also of each employer, as well as the condi-

[7] Cf. note 18.

[8] E. g., the Act provides that an employer, defaulting in his payment of premiums, shall be liable to suit by the injured workman, as prior to 1911, but without specified defenses then available. Rem. Rev. Stat. Wash., § 7676.

tion of the fund. Rem. Rev. Stat. Wash., § 7676. A basic premium rate, to apply for the ensuing calendar year, is fixed annually for each class, which takes account of its cost experience over a two-year period and of the condition of the class fund. At the same time a premium rate of each employer is fixed with relation to each class, also to apply for the ensuing year, which takes into consideration the employer's average cost experience "for each workman hour reported by him during each fiscal year . . . over the five year period" immediately preceding the determination. The actual premium rate the employer is required to pay consists of 40 per cent of the basic rate plus 60 per cent of his cost rate as thus determined; but in no event is the total rate to exceed 160 per cent of the basic rate.

Premiums when paid are placed to the credit of the employer in the appropriate fund, but become the exclusive property of the state earmarked and appropriated for the specific uses provided by the statute. Rem. Rev. Stat. Wash., § 7676. See *State ex rel. Trenholm* v. *Yelle*, 174 Wash. 547, 550. No provision is made for repayment or recovery of any employer's contribution once it is paid in, regardless of whether the full amount is required to compensate his or others' employees for injuries sustained; and no such repayments are contemplated. Awards are payable solely from the appropriate fund thus accumulated and payment is in no wise dependent upon the employer's continued existence, operation or contribution to the fund. Nor, under the plan, can payment affect the rate of premium for the year in which the award is allowed.

In view of these provisions and effects, the state Supreme Court has declared that neither the employer nor the employee has a vested right or interest in the fund; the moneys when collected are public moneys, held and administered by the state, albeit pursuant to the statutory purpose they constitute a "trust fund" for the benefit of injured workmen and their dependents.[9] The fund is therefore in no sense the private property of the employer. Consequently the payment of awards out of the fund in itself could not amount to a deprivation of the employer's property. Indeed, ap-

[9] See the opinion of the court upon the first appeal in this cause, 21 Wash. 2d 420, 427-429; Mattson v. Department of Labor, 176 Wash. 345, 347-348, affirmed, 293 U. S. 151; holding that the 1927 amendment putting a limit of three years to the employee's right to claim compensation as of right impaired no vested right of the employee, whether of property or equal protection under the Fourteenth Amendment, or of contract under Article I, § 10, of the Federal Constitution, and authorities cited.

pellant does not urge that the application of moneys previously paid in to the payment of an award of itself works the claimed unconstitutional result. Rather this is said to arise from the effect the award and its payment may have, by virtue of the statute's provisions relating to cost experience in the fixing of rates, upon appellant's liability for the payment of premiums in the future. It is anticipated, not presently realized or immediate, financial injury of which complaint is made.

As has been noted, in computing the rate of premium the Director is required to take into account not only the cost experience of each class over a previous two-year period, but also the average cost experience of each employer over the immediately preceding five-year period, in addition to "the then condition of each class and/or sub-class account." The quoted reference relates to the requirements for the keeping of class accounts, in the administration of the fund, for crediting of the payments made by each employer to the appropriate accounts, and for the charging of awards made to or on account of injuries to his employees against his experience. Rem. Rev. Stat. Wash., § 7676. It is this charge of which appellant complains, in the view apparently that it necessarily will entail the payment of a higher premium in years following the one in which the award is made, when the rate computed as the statute requires will reflect inclusion of the award in its cost experience. Accordingly, since it determines that the charge will be made, the allowance of an award is said to be a matter vitally affecting the employer's substantive liability and constitutes a final adjudication of that liability to the extent that the charge may affect the future rate.

Moreover, the statute provides in its procedural phases for the employer to have notice and the right to participate fully in the determination.[10] It must be taken that this right is conferred

[10] Report of accident and claim for compensation must be filed with the appellee Department of Labor and Industries. If either the claimant or the employer is aggrieved by any order, decision or award, he may petition for rehearing before the Joint Board of the Department. If rehearing is granted, the board may receive testimony. Appeal lies from the board's order to the Superior Court, where the matter is triable *de novo*, but upon the record made before the board, and from the Superior Court's judgment to the Supreme Court. Rem. Rev. Stat. Wash., § 7686; (1943 Perm. Supp.) § 7697.

No complaint is made that appellant did not have full benefit of the Act's procedural protections.

Although the Act does not provide specifically for the employer to contest the validity of an award at the time the Department is fixing the rate for

for the employer's protection in the fixing of rates as they may be affected by the allowance of awards through the inclusion of his cost experience as a factor in rate computation. Especially in view of these procedural protections, appellant urges that its substantive liability, once it is terminated through barring of a claimant's right to proceed by lapse of time, becomes an adjudicated matter, substantive, not merely procedural or remedial in character; and cannot therefore be revived consistently with the decision in the *Danzer* case.

Were this all, and were the state of the record plain that the allowance of the award necessarily would result in a later increase of the premium, we would be confronted with the necessity of determining whether such an increase would constitute the kind of injury or detriment forbidden by the due process clause. A mere increase in premium, under a compulsory and publicly administered accident insurance plan, designed to operate at cost based upon general and individual experience rather than at an arbitrary figure,[11] and surrounded with adequate procedural safeguards against arbitrary action, would not seem to be so obviously harsh or arbitrary in its effect upon employers generally that it could be said without question to be beyond the scope of the state's regulatory power or in violation of the due process prohibition of the federal Constitution.

But we are not faced with the necessity for deciding that question. Although appellant's brief states that "the award will be paid in large measure" by itself, it is not asserted that this burden will result from any increase in appellant's rate or in fact that any increase necessarily will follow from allowance and payment of the award. On the contrary, the statement seems obviously

---

the ensuing year or when he is called upon to pay that premium, it does not appear affirmatively that he may not have remedy then under the general law of the state. Cf. Copperweld Steel Co. *v.* Industrial Commission, 324 U. S. 780.

[11] The original act, as adopted in 1911, provided for a uniform rate of premium to be collected from all employers. Laws of Wash., 1911, c. 74, § 4. The cost feature based upon experience was introduced in 1931. Laws of Wash., 1931, c. 104, § 1.

The original act with its feature of "uniform payment" was held constitutional by this Court in Mountain Timber Co. *v.* Washington, 243 U. S. 217, affirming State *v.* Mountain Timber Co., 75 Wash. 581. See also State *ex rel.* Davis-Smith Co. *v.* Clausen, 65 Wash. 156. The "cost experience" amendment was said to be valid in State *ex rel.* Crabb *v.* Olinger, 196 Wash. 308, overruled on another point in St. Paul & Tacoma Lumber Co. *v.* Department of Labor, 19 Wash. 2d 639, 649.

irrelevant, or erroneous in so far as it may be taken to imply that either of these consequences will follow, since in no event can the award be paid out of the funds collected from an increase produced wholly or in part by its allowance. It is not until after the award has been allowed that it can be charged to the employer's experience or affect his rate of contribution.

Moreover, if appellant is taken to argue that an increase will result for the year or years following the award's allowance, the record neither demonstrates this nor furnishes support for an inference that such a result necessarily or even probably will follow. As the Department points out, the payment when made may be one factor in determining appellant's future rate. But the record does not disclose what rate appellant has been paying. For all that appears, this may be the maximum permitted by the statute, in which event no injury, present or future, could result from allowance and payment of the award.[12] Moreover, if it were assumed that the rate was less than the maximum, whether or not an increase would result or, if so, whether it would be substantial, are questions wholly speculative.

A variety of considerations makes them so. Appellant's experience is but one factor in the computation. It affects only 60 per cent of the actual rate. A single award is reflected in this fraction only as it affects the five-year individual average. When so reflected the amount of resulting increase in that average and in the fraction may be infinitesimal or insubstantial. The ultimate effect upon the actual rate will be watered down nearly by half through inclusion of the 40 per cent factor for class experience. Since the condition of the fund also must be considered, this too may minimize further the effect or, so far as appears, make an increase entirely unnecessary. The record furnishes no evidence concerning the condition of the fund, the class experience over the required period or the appellant's individual experience over the specified five years. The amount of the award is small, $460.50.

In sum, all that the record discloses is that this amount will be charged against the appellant's experience and taken into account with other factors, as the statute requires, in the computation for some future period, with possibly some increase resulting

[12] Except possibly upon the contingency, equally speculative upon the record, that the maximum rate might be reduced in case the charge resulting from the award were not made.

in the rate. But, in the absence of all evidence showing the facts concerning the other factors, it is entirely problematical whether an increase will follow or, if so, whether it will be wholly mathematical and infinitesimal or substantial in its ultimate effect upon appellant. This being so, appellant's complaint comes down, on the record, to nothing more than the bare possibility of some injury in the future.

The Fourteenth Amendment, through the due process clause, does not assure protection from the states' regulatory powers against injuries so remote, contingent and speculative.[13] Some substantial and more immediate harm must be shown to present a justiciable question concerning the state's power. The injury, as it appears from this record, is neither so certain nor so substantial as to justify a finding, upon that showing, that appellant's substantial rights have been or will be invaded by allowance and payment of the award.

Moreover, under the Act's procedural provisions, appellant has at no time been free from this contingent liability, whether before or after the 1941 amendment. For, although the 1927 amendment precluded the employee from filing claim as of right after the three-year period, it followed the original act in placing no limit upon the time within which the Department, of its own motion, might reopen the claim and increase, reduce or terminate the compensation.[14] Appellant therefore was at all times substantively liable to have its premium rate increased by the allowance of an award for aggravation; and the initial award, in consequence, was in no sense *res judicata* against later imposition of this liability.[15] Appellant's contrary argument erroneously cor-

[13] Cf. Mallinkerodt Chemical Works *v.* Missouri ex rel. Jones, 238 U. S. 41, 54; Plymouth Coal Co. *v.* Pennsylvania, 232 U. S. 531, 544-545, and authorities cited. Cf. also Castillo *v.* McConnico, 168 U. S. 674, 680; Tyler *v.* Judges of the Court of Registration, 179 U. S. 405; Frothingham *v.* Mellon, 261 U. S. 447, 488.

[14] See the terms of subsection (h) in its original and amended forms as set forth in note 5; Smith v. Department of Labor, 8 Wash. 2d 587; cf. note 15.

[15] It was exactly to prevent such rigid finality that the statute preserved both the Department's unlimited power to reopen the case and the employee's power to have it reopened as a matter of right during the limited period. From the beginning the Act seems to have been drawn to avoid the crystallizing effects of the doctrine of *res judicata* in relation to awards, whether as against the employer or the employee. The idea apparently was that the initial award for an injury would afford compensation for harms then apparent and proved. But it was recognized, on the one hand, that all harmful consequences might not have become apparent at that time

relates its own liability to pay premiums, for purposes of applying the statute's bar, with the employee's right formally to institute the proceedings (and to have judicial review) for securing an award, and assumes that this liability was terminated.[16]

It is true that the restoration, by the 1941 amendment, of the employee's right of taking the initiative may have had practical effects toward increasing the rates of premium, although none are shown by this record with any certainty. But appellant is seeking to have a state statute voided on the ground that it works a substantial injury to its substantive rights by creating or recreating a liability which had been extinguished by previously applicable law. It thereby has undertaken to demonstrate not only the injury and its substantial character, but as part of that burden the extinction of the preexisting substantive liability. This it has not done and could not do, in view of the Department's power to reopen the claim. It has succeeded only in showing that one mode provided by the preexisting law for bringing the liability into play had been terminated. It was this and only this which the 1941 amendment revived. At the most, therefore, appellant's injury, if it were otherwise more substantial, would consist in the restoration of an alternative, if also possibly a more effective, method for putting in motion the machinery provided for making an award.

In our view appellant has not made the showing of substantial harm, actual or impending, to any legally protected interest which

---

and, on the other, that harms then shown to exist might later be terminated or minimized. Cf. Choctaw Portland Cement Co. v. Lamb, 79 Okla. 109, 110. The purpose of the provisions for reopening, whether at the instance of the employer, the employee, or the Department, cf. notes 5 and 14, obviously was to prevent the initial award from finally cutting off power to take account of these later frequent developments. It was to maintain a mobile system, capable of adapting the amount of compensation from time to time in accordance with the facts relating to the injurious consequences for disability as they actually develop, not to cut off rigidly the power either to increase or to decrease the compensation once an award had become "final" for purposes of appeal.

[16] Obviously the liability and the right were not coextensive in duration, since the one continued after the other had been cut off. They were lacking also in correlation of obligation, since the employer was bound to pay the fund, not the employee; and the latter recovered from the fund, not the employer. Right and liability are usually correlative in a legal relation. But in this instance the correlation, as appellant poses it, is lacking; for two legal relations are involved, from each of which it seeks to extract a correlative.

is necessary to call in question the statute's validity.[17] Accordingly, the appeal must be and hereby is

Dismissed.[18]

Mr Justice BLACK is of the opinion that the only practical effect of the challenged state statute was to give to an injured employee a right to judicial review of an administrative action; that a contention that such a statute violates the Federal Constitution is frivolous; and that the appeal should be dismissed for that reason.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

---

[17] Cf. Mattson v. Department of Labor, 293 U. S. 151.

[18] Appellees have urged that the 1941 amendment did no more than restore the right of judicial review, as to claims filed after the three-year period, which prior to 1927 had existed with reference to all claims for aggravation without limitation as to time; and therefore the amendment could be taken in no way to violate any provision of the Constitution. It is true that the 1941 amendment restored the employee's right of judicial review where previously none had existed. But it accomplished more. It invested the employee with the right to require the Department itself to proceed, where previously no such right existed. Whether or not this would give cause for complaint, if the right were coupled with a more substantial and less contingent injury than is shown to exist in this case and with a previous total extinction of the employer's liability, need not be determined.

SUPREME COURT OF THE UNITED STATES.

No. 53.—October Term, 1945.

Gange Lumber Company, Appellant, *vs.* Ralph Rowley and Department of Labor and Industries of the State of Washington.	Appeal from the Supreme Court of the State of Washington.

[November 13, 1945.]

Mr. Justice Douglas, with whom Mr. Justice Burton concurs.

We cannot agree that the injury to appellant is so remote and speculative as to preclude it from attacking on constitutional grounds the award in question. The award, whether small or great, enters into the employer's cost experience; and the future premium payable by the employer reflects in part any increase or decrease in his cost experience. If the employer is not paying the maximum rate, an increase in his cost experience will inevitably make him pay a rate which would be lower but for the increase in his cost experience. And if, perchance, he is already paying the maximum rate, an increase in his cost experience will inevitably hold him there longer or lessen any reduction to which he otherwise would be entitled. The precise effect on future rates cannot, of course, be presently ascertained. Nor could it be shown in any case, whether the award was $460 or $46,000. For the rates are fixed annually and at the time of any one award all of the elements entering into the future computation will not be known. So if this employer is barred here because he can show no injury, he and all other employers will be barred in every case.[1] Yet we know from the operation of the system that the cost experience of each employer determines 60 per cent of his future rate. Their

[1] We are not advised that the employer can contest the validity of a prior award at the time the Department of Labor and Industries is fixing the premium rate to be paid into the fund for the ensuing year. The pertinent statute (Rem. Rev. Stat. § 7676) does not prescribe such a remedy and the decision of the Washington Supreme Court in Mud Bay Logging Co. *v.* Department of Labor, 189 Wash. 285, 286, would seem to indicate that it is not contemplated.

respective costs also affect to a lesser degree the basic premium rate applicable to each employer's class, and 40 per cent of that basic rate is reflected in the actual premium rate paid by each employer in that class. We might as well say that no employer could ever challenge the constitutionality of an award under this system because bankruptcy, fire or some cataclysm might put him out of business before a new rate is fixed.

On the merits we think *Campbell* v. *Holt*, 115 U. S. 620, and *Chase Securities Corp.* v. *Donaldson*, 325 U. S. —, govern this case. At no time was the employee's claim for aggravation extinguished. At all times the Department could have reopened the claim and made an additional award. We therefore do not reach the question of the constitutionality of an act which makes it possible to enlarge an award where previously there had been a final adjudication of the claim. Cf. *Danzer & Co.* v. *Gulf & Ship Island, R. Co.*, 268 U. S. 633.

We would affirm the judgment.